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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 212

NEW YORK CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

DONATO MARCONE, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH MARCONE, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

PETITION FOR CERTIORARI FILED JULY 1, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

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[fol. 1]

IN CIRCUIT COURT OF HUDSON COUNTY

DONATO MARCONE, Administrator of the Estate of Joseph Marcone, Deceased, Plaintiff,

v.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Defendant

Action at Law

COMPLAINT—Filed July 15, 1927

Plaintiff residing at No. 1450 New Durham Avenue, North Bergen, in the County of Hudson, and State of New Jersey, says that:

1. Defendant is now and was at all times hereinafter mentioned, a common carrier by railroad, engaged in interstate commerce.

2. Intestate of plaintiff, at all times mentioned in the within complaint, was the servant of the said defendant and engaged by it in the work of interstate commerce, in which he was working at the time of his death.

3. On the 27th day of July, 1926, the defendant by its agents and servants, negligently propelled against the intestate of the plaintiff a locomotive, while he was working as aforesaid for the defendant in interstate commerce, at the round house of the defendant, at New Durham, Hudson County, New Jersey.

[fol. 2] 4. The negligence of the defendant consisted in this:

That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc. so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; did not use reasonable care to equip said locomotive with suitable headlight or any light; and did not use reasonable care to propel same at safe rate of speed.

5. By reason of the said striking of the intestate of the plaintiff by said locomotive, through the negligence of the defendant, its servants and agents as aforesaid, the intestate of the plaintiff was killed.

6. Intestate of plaintiff was at all times in the exercise of due care for his safety.

7. Intestate of plaintiff left him surviving, his father, the plaintiff herein, age 55 years; Giancinta Morcone, his mother, age 54 years; Antonietta Morcone, his sister, age 13 years and Victoria Morcone, his sister, age 15 years, who have suffered pecuniary injury by reason of his death.

8. The within action is commenced within twenty-four calendar months after date of death of plaintiff's intestate.

Plaintiff demands $25,000.

Alex. Simpson, Attorney for Plaintiff.

[fol. 3] IN CIRCUIT COURT OF HUDSON COUNTY

[Title omitted]

ANSWER—Filed August 1, 1927

The defendant, New York Central Railroad Company, a corporation of the State of New York, having its office and princip-le place of business in the City and State of New York, answering the complaint herein says that:

1. It admits Paragraph 1.

2. It admits that plaintiff's intestate at the times mentioned in the complaint was employed by defendant as a machinist's helper. It denies all allegations of Paragraph 2.

3. It denies Paragraph 3.

4. It denies Paragraph 4.

5. It denies Paragraph 5.

6. It denies Paragraph 6.

7. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 7.

8. It admits Paragraph 8.

[fol. 4] Second Defense

Any injuries sustained by plaintiff's intestate arose out of his negligence in going and standing upon a railroad track operated by defendant at a time when it was unnecessary, improper and obviously dangerous for him so to do.

Third Defense

At the time and place, when and where plaintiff's intestate received injuries set out in the complaint he was a mere licensee.

Fourth Defense

At the time of the injuries complained of, plaintiff's intestate was not engaged in interstate commerce.

Wall, Haight, Carey & Hartpence, Defendant's Attorneys.

[fol. 5] In Circuit Court of Hudson County

Before Hon. A. Dayton Oliphant, J., and a Jury

Donato Marcone, Administrator of the Estate of Joseph Marcone, Deceased, Plaintiff,

v.

New York Central Railroad Company, a Corporation, Defendant

Case

Jersey City, N. J., May 4, 1928.

Appearances: Alex. Sampson, Esq., for the Plaintiff; Wall, Haight, Carey & Hartpence, Esqs. (by Mr. Carey), for the Defendant.

Mr. Simpson: I would like to offer letters of general administration granted on the 25th day of April, 1927, to the plaintiff Donato Marcone, on the estate of Joseph Marcone.

The Court: Let it be marked.

(Marked Exhibit P-1 of this date.)

JEROME GORDON sworn.

Direct examination by Mr. Simpson:

Q. Mr. Gordon, this is a map of the New Durham Railroad house, round house, of the New York Central Railroad as it appeared on July 27, 1926?

A. It is, sir.

Q. What is the distance from this point right around to [fol. 6] here?

A. That was taken in short, so I couldn't tell you.

Q. What?

A. I took those in short measurements.

Q. Can you tell us generally how large the round house is from one point to the other?

A. No, I couldn't, unless I scaled the distance.

Q. Well, come down and scale it.

A. (Witness leaves stand and goes to the blue-print diagram.) 810 feet.

Q. Now, while you are here will you scale line on the inside? Does that indicate the end of the round house,—this?

A. This is the end of the round house.

Q. What is the width of the enclosed building—eight hundred feet from end to end, what is this?

A. Ninety-two and one-half feet.

Q. What is the distance between the stall marks here—what is the distance between that stall and the stall on each side of it?

A. I have got that in my notes.

Q. All right, tell us that please.

A. (Witness resumes stand.) The width of the doorway is 13.35 feet at that stall.

Q. What is the clearance between the tracks of the stalls on each side of the stall measurement on this map which I understand to be the stall upon which the engine was?

A. Approximately fourteen feet.

Q. And what is the width of the stall in which this engine was?

A. That is the doorway, 13.35 feet.

Q. Have you got the measurements of this engine that was on this stall?

A. It is right on the map here.

Q. What is that?

A. 17.2-15/16.

[fol. 7] Q. In length?

A. Yes.

Q. What is the width of the greatest overhang—the widest part of it?

A. 10.2 feet.

Q. That is the widest part?

A. Yes.

Q. What is that, the tank part?

A. No, that is in front of the locomotive.

Q. What is the greatest width of the rear tank as the engine backed out? What is the greatest width of the rear?

A. I haven't got that. I have just got the extreme measurements. It is less than ten feet.

Otto Bechtol sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. Bechtol?

A. Seventeen Moffett Road, Little Ferry.

Q. On the 17th of July, 1926, where were you employed?

A. New York Central roundhouse, at Grandon and New Bergen.

Q. Grandon?

A. Grandon, North Bergen.

Q. What part of the roundhouse were you employed in?

A. In the second section.

Q. What is that on this map? What does the second section mean?

A. There is a house one and two and three.

Q. You mean the roundhouse is divided into——

A. Yes, the walls divided.

Q. The walls divided this roundhouse into three different houses, is that it?

A. Yes.

Q. You were in what section?

A. I was in about the center, about in the center of the second section.

Q. The middle of the second section?

A. Yes, sir.

Q. What time of day or night were you at work there?

[fol. 8] A. Well, probably could have been a quarter after two in the morning.

Q. You went to work at a quarter after two in the morning?

A. No, when I went to work?

Q. Yes.

A. That was seven o'clock at night.

Q. About a quarter after two in the morning where were you working, in the same position? About the center of number two?

A. When I went to work at seven o'clock I was working in that section.

Q. No, I didn't ask you that. You stated some time—a quarter after two, didn't you say—a quarter after two you were discussing—you referred to a quarter after two in the morning, didn't you?

A. Yes, sir.

Q. What were you doing then?

A. I was working on the locomotive.

Q. What locomotive?

A. Well, I don't know just which one, I don't remember the number of it.

Q. Was your attention attracted to anything?

A. No, sir.

Q. Did the foreman—not what the foreman said to you but did the foreman come in and say something to you that caused you to go out?

A. I was working on this locomotive and it was kind of a hot job and I came out from the locomotive to get cooled off, and as I was being cooled off this foreman comes along and he says——

The Court: Now what he said.

Q. He said something to you?
A. Yes.
Q. Now as a result of what he said to you what did you do?
A. I went out to see what happened.
Q. Where did you go?
A. Out towards the turntable.
[fol. 9] Q. How far was that from it from where the foreman spoke to you?
A. (No answer.)
Q. Where were you when the foreman spoke to you, outside getting cooled off?
A. No, in the house at the front of the engine.
Q. That is number 2?
A. Yes.
Q. And was the front of the engine towards the turntable or away?
A. Away.
Q. You were standing there getting cooled off and the foreman came in and said something to you and then you went out?
A. Yes, sir.
Q. Where did you go with the foreman?
A. I went out alone.
Q. What was the foreman's name?
A. James Kelly.
Q. When you went out where did you go?
A. Went out towards the turntable.
Q. Did you go out towards the turntable?
A. Yes, sir.
Q. What did you find there?
A. (No answer.)
Q. What did you find when you got out there? What did you see?
A. I seen there was something wrong.
Q. What did you see was wrong?
A. I inquired and I was told——

Mr. Carey: I object to what he was told.
The Court: You are asked what you saw.

Q. What did you see?
A. Well, I seen this Joseph Marcone.

Q. Where did you see him?
A. Underneath the tank.
Q. Tank of what?
A. The tender, the coal tender.
Q. Of the engine, was it?
A. Yes.
Q. What engine was it?
A. 3709.

[fol. 10] Q. What time was it, you say, a quarter after two when you went out?

A. It might have been around that; I don't just exactly remember.

Q. Was it around a quarter after two in the morning?
A. It was after two.

Q. What was his position when you found him under the tank of this locomotive?

A. He was just coming out from under the axle.
Q. Coming out or being brought out?
A. Well, he was laying down on the turntable.
Q. What track was his body lying on?
A. On the turntable.

Q. Is there more than one track on the turntable or only one?

A. One track.
Q. One track?
A. Yes.
Q. Where was the locomotive?
A. The locomotive was off the table.

Q. Where? Had it backed completely off the table or had it gone in the roundhouse or where was it?

A. She was coming out of the roundhouse and going onto the table.

Q. And when you found his body was the locomotive moving or not moving?

A. Standing still.

Q. What position was it on the turntable? Which way was the head pointing?

A. Towards the roundhouse going in.
Q. Towards the roundhouse?
A. Yes, sir.
Q. And the rear away from the roundhouse?
A. Yes, sir, towards the turntable.

Q. Had it gone over the turntable or hadn't it yet gone on the table?

A. It was probably three-quarters the way on the table.

Q. What was the condition of this man's body?

A. Well, as I found the body I felt it and it felt warm, so I thought there was life in the boy and I wanted to do what I could do for him.

[fol. 11] Q. Well, what did you do?

A. And I picked the boy up and as I picked him up—I lifted him clear of the track and laid him alongside.

Q. What was his condition?

A. When I seen his condition I seen he had no head and had no arm.

Q. Which arm was cut off?

A. Right.

Q. What position was his body when you got it out before you started to move, and what position was it on the track?

A. It was laying on the right side.

Q. The body on the right side?

A. Yes.

Q. Where was it, across the track?

A. Yes, across.

Q. Was the head outside the track or was his head under the locomotive?

A. Well, his head was under the tender.

Q. Of the locomotive? Did you look for any bloodstains? Did you try and trace any bloodstains to see where the locomotive had come from?

A. No, I didn't trace any bloodstains, but after I found the body I thought it was the pumper. He had a blue shirt on and I knew he had a blue shirt on, and I was looking for his lantern.

Q. You found no lantern?

A. I found no lamp, but I located a cap.

Q. How far was the cap from the body?

A. It could be maybe fifty feet.

Q. Toward the roundhouse?

A. Yes, toward the roundhouse.

Q. Was it in the roundhouse?

A. No, sir.

Q. How close was it to the roundhouse?

A. Well, probably twelve to fifteen feet.

Q. And where was it lying, this cap, between the tracks?

A. Between the tracks.

Q. Well, which tracks? The tracks that lead tc the turntable?

[fol. 12] A. To the turntable, that the engine was on.

Q. So you saw the engine on the turntable? You saw the track it was on. If that engine had continued on head foremost was the cap on the same track that the engine would have gone into the roundhouse on?

A. Yes, sir.

Q. Do you know of your own knowledge what track this engine that you have mentioned came out of the roundhouse on? Do you know what track she was on?

A. Track eight.

Q. When did you see her on track eight? How long before the accident?

A. Well, I passed her all night.

Q. On track eight?

A. As I went to work, yes.

Q. What time was she first in there, do you know? Do you know when you first went to work was she in there?

A. Yes.

Q. What kind of locomotive was she?

A. Freight locomotive.

Q. Had you done anything to her that night?

A. No, I don't remember.

Q. How long had Marcone worked in that roundhouse, to your own knowledge?

A. I believe he had worked there a few times that I know of.

Q. How long a time?

A. I couldn't say.

Q. Do you know what his work there was?

A. Box packer.

Q. What does that mean?

A. Lubricating.

Q. What does that mean?

A. Lubricating the journals and the like of that.

Q. Putting grease in it?

A. Putting grease in, yes.

Q. Anything else?

A. That is all I know.

Q. Did you know him well or did you just see him around [fol. 13] roundhouse?

A. From working, associating with him.

Q. Associating in your work?

A. Yes.

Q. Was he helper or was he the boss packer himself? Was there anybody over him?

A. Well, yes, they have a foreman over them.

Q. Who was he, do you know?

A. Mr. Siddell.

Q. Now, before you came out of number two, say for fifteen or twenty minutes before the foreman came in and spoke to you, which you say was about a quarter after two, had you noticed how many engines were in the roundhouse?

A. No, that I couldn't tell you.

Q. Well, a number were there besides this one?

A. Yes, there were more.

Q. There were more than this in the roundhouse?

A. Yes.

Q. Were men working on the others?

A. Yes, they work on different engines wherever they have work to do.

Q. Who was the foreman of the roundhouse that night of the accident?

A. Mr. Kelly.

Q. Did you walk around this engine before you found the body or did you go around it after you found the body?

A. No, I didn't go around the engine at all.

Q. You didn't notice that there was no light on the back of the engine?

Mr. Carey: I object to the form of the question.

The Court: Sustain the objection.

A. No.

Q. Did you make any examination of the back of the engine yourself?

A. No, sir.

Q. What was the condition of the place where you found [fol. 14] the body? Could you see the body easily or did you have to take a lantern?

A. I had no light; I felt my way.

Q. You felt your way?

A. Yes, sir.

Q. It was dark?

A. Yes, sir.

Q. And how far did you feel until you came in contact with this body? Did you walk along the locomotive?

A. Well, it wasn't just so dark, you know, that throws a shadow, under a tender.

Q. Well, you felt your way, did you? Did you feel your way as you have sworn to a little while ago?

A. Yes, I felt for the body.

Q. You felt your way, you say?

A. The boy had a blue shirt on and that I located.

Q. You said you felt your way? It was dark? You felt your way?

A. No, not exactly all the way, what you would say all the way.

Q. If you said——

A. When you get under a tender——

Q. Wait a minute. After you said it was dark and "I felt my way," did you get a signal from anybody in the back of the court room?

A. No.

Q. Now will you go back there where you said it was dark and "I felt my way," just go back to that.

(Stenographer reads witness's previous testimony.)

Q. When you got the body did you take it out without a lantern?

A. Yes, sir.

Q. What did you do after you took it out?

A. When I seen what condition the body was in I went down and got a piece of canvas and covered it.

Q. Now before you went out how did you know to go exactly where this body was, if you didn't know anything about the accident?

A. Well, when something happens like that, you know [fol. 15] there is something wrong.

Q. Yes, but you didn't see this accident, you say?

A. No, sir.

Q. You didn't know anything about it?

A. No.

Q. And yet you went exactly to where the body was?

A. No, sir.

Q. Well, you did get the body out, didn't you?

A. Well, yes, when you walk along an engine and you are looking there.

Q. Don't make a lot of speeches. Did you get the body out?

A. Yes, sir.

Q. You are still working for the Central, aren't you?

A. Yes, sir.

Q. Now up to the time the foreman came in and told you, had you heard any whistle blown in the roundhouse?

A. That I don't remember, for there is all kinds of whistles blown, all kinds.

Q. I asked you if you heard any whistle. You say you don't remember, is that right?

A. I heard whistles.

Q. How long before the foreman came in did you hear the last whistle?

A. Well, probably five minutes or so.

Q. Well, what do you mean, five minutes or so? Do you mean it was more than five minutes?

A. There are whistles blowing there all times. You really don't know what they mean. You are working. The men may be testing out the whistle.

Q. In other words, whistling all the time, is that it, and you don't know what they mean, is that what you mean?

A. Yes, off and on in different parts of the house.

Q. Now then, about the ringing of the bell, did you hear any bell rung within five or ten minutes before you went out?

A. Yes.

[fol. 16] Q. How many bells did you hear?

A. Well, that I couldn't just say how many bells.

Q. A number of them?

A. Yes, more than one.

Q. How many more than one?

A. Well, that I couldn't just swear to here, how many more than one. For you hear them and you don't know who is ringing them. There is an air man and he tests it out the air and he is trying the bells.

Q. So if you hear a bell it may be a man testing it as far as you know?

A. Yes.

Q. And the same is true of whistles? Now this roundhouse, this track that is marked here, is this the one you refer to, this track eight, the eighth track? That is the one you call track eight, is it?

A. Yes, sir.

Q. When did you last see the man who was killed before you found his body? Had you seen him that night I am talking about?

A. Yes, I seen him that night.

Q. How long before he was killed had you seen him for the last time?

A. At dinner time.

Q. What time was that?

A. At twelve o'clock.

Q. That is midnight?

A. At midnight.

Q. Where did you see him?

A. Seen him out behind the roundhouse.

Q. Outside of the roundhouse?

A. Yes, sir.

Q. Was he employed outside as well as inside?

A. Well, that—sometimes they are—it is all according to where the engine is at the time.

Q. He was sort of a laborer, wasn't he, around there?

A. No, he was a box packer.

Q. He did nothing but pack the boxes, did he?

A. Yes, sir.

Cross-examination by Mr. Carey:

Q. You say you were in section two of the roundhouse [fol. 17] when the foreman spoke to you?

A. Yes, sir.

Q. And section two is in the middle of the roundhouse?

A. Yes, sir.

Q. There are three sections altogether?

A. Three sections.

Q. Won't you come down here and show us about where you were when the foreman spoke to you.

A. (Witness leaves the stand and goes to diagram.)

Q. Do you happen to remember what track you were on?

A. Fourteen.

Q. Here is track fourteen (indicating)?

A. Yes, sir.
Q. And that was about where you were?
A. Yes, sir.
Q. And were you inside the roundhouse or outside?
A. Inside.
Q. Inside?
A. Yes, sir.
Q. And the foreman who spoke to you was Mr. Kelly?
A. Yes, sir.
Q. And you went out after he spoke to you, and where did you go?
A. Went out to the turntable.
Q. Did you go towards the turntable because of anything that Mr. Kelly said to you?
A. Yes, sir.
Q. From what Mr. Kelly had said to you did you understand that an accident had happened?
A. Yes, sir.
Q. And you spoke of feeling your way to find the body, as I understood you, is that right?
A. Well, yes, of course I didn't just mean it the way you put it. When a man works nights, you see, it is a different thing altogether.
Q. Yes. Now, which side of track eight did you find this body on?
A. It laid right across.
Q. Across one of the rails?
A. In between the rails.
[fol. 18] Q. In between the rails?
A. Yes, sir.
Q. Was any part of the body outside of the rail?
A. No, sir, not that I noticed.
Q. And on which side of the tracks did you take the body out?
A. From the left side, going on to the turntable from the house, facing the engine.
Q. On the left side facing which way, toward the turntable or toward the roundhouse?
A. Toward the turntable.
Q. Then, this being track eight here, left hand side as you were facing toward the turntable would be the side farthest away from this end of the roundhouse, wouldn't it?
A. (No answer.)

Q. Suppose you come down here and point out the side. Here is track eight.

A. Yes.

Q. You were facing the turntable?

A. Yes.

Q. And took it out on the left hand side.

A. Of the turntable here.

Q. It was down on the turntable?

A. Yes, sir.

Q. And when you spoke of the left-hand side you meant the left-hand side as you were facing the turntable?

A. Yes, sir, coming toward the turntable.

Q. Was anyone there before you reached the place where you found the body?

A. Yes, sir.

Q. Who was there?

A. There was a turntable operator and hostler.

Q. What is his name?

A. Maloy, I believe.

Q. Who else?

A. I believe they called him McGee.

Q. Called him what?

A. McGee.

Q. Yes.

A. That is what I knew him by.

Q. Anybody else besides Maloy and McGee and yourself?

A. I don't remember.

Q. Was Mr. Kelly there?

A. No, sir.

Q. Now you felt for the body, did you? When you got [fol. 19] there you felt for the body?

A. Well, I located the body first by seeing his shirt. He had a light shirt on.

Q. Could you see the color of his shirt before you began feeling for him?

A. Yes, then I knew that there was something there. I didn't know it was a body or what it was.

Q. You didn't know whether it was a body or something else?

A. Yes, that is what I meant by feeling.

Q. Now you spoke of the tender, the tender of the engine casting a shadow. Is that true? Did it cast a shadow?

A. Yes, underneath.

Q. And you had no lantern?

A. No, sir.

Q. How did you see to get from the place where you work to the place where you found the body in the night?

A. Oh, you can see that much—you are working.

Q. Lights there?

A. Day after day you are doing that.

Q. Lights around the roundhouse?

A. Yes, sir.

Q. What kind of lights?

A. Electric lights.

Q. So that you had no trouble in going from the place you were to the turntable?

A. Oh, no.

Q. Plenty of light?

A. Yes.

Q. Now, what was the position of the body with respect to the tender? Was it near the end as the tender was being backed onto the turntable or was it at the front end of the tender?

A. Toward the back end.

Q. Back end?

A. Yes, just coming on the tracks.

Q. The rear trucks of the tender?

A. Yes, sir.

Q. There are two trucks there together, aren't there, on the engine, on each side?

A. One truck with three pair of wheels under it.

[fol. 20] Q. On truck with three pairs of wheels, and the wheels where you found the body was the wheels n-arest the rear end of the tender?

A. No, coming from under the truck towards the center of the tender.

Q. Towards the center of the tender?

A. Yes, sir.

Q. Did anyone help you remove the body?

A. No, sir.

Q. You say that you did hear a whistle about five minutes or so before you got to the place where the accident happened?

A. Yes, sir.

Q. And you heard a bell ringing at the same time?

A. I heard bells ringing, yes.

Q. As the same time or about the same time you heard the whistle?

A. Well, yes, there are whistles and bells blowing and ringing at all times.

Q. Now when you say that you felt your way you mean that you felt your way to a point where—that you felt your way to reach the body after you had found where the body was located?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. You said to Mr. Carey that you couldn't tell what it was under the engine when you got there and yet there was plenty of light. Now if there was plenty of light how is it you couldn't tell what was under the engine?

A. There is plenty of light in the surrounding——

Q. Will you tell this jury what you meant when you swore under oath that when you first got there you couldn't tell what it was under the engine and that there was plenty of light? How is it if there was plenty of light you could — tell what was under the engine, whether it was a dog or a [fol. 21] man or what it was?

A. When I got there I felt the body.

Q. That don't answer my question, but I won't waste time on it. Now come down here and show us where the nearest electric light is. Show us where all the electric lights are; tell where you found the body.

A. There is an electric light at each end of the table.

Q. How high is it? Is it an arc light or is it an incandescent light like one of these? Is it like a street light or like a room light?

A. No, it had kind of a reflector.

Q. How high is it above the turntable?

A. It may be ten or twelve feet.

Q. How far was it from where you found the body to the nearest light?

A. Probably could have been seventeen feet.

Q. Now you say you didn't see this accident?

A. No, sir.

Q. You didn't hear anything about it? You didn't know anything about it—is that right—of your own knowledge?

Mr. Carey: If the court please, he hasn't said that.

Q. I mean you didn't see it, the actual running over of the man, did you?

A. No, sir.

Q. Didn't you tell this boy's father that he was run over because no warning was given?

A. No, sir.

ARTHUR J. WEISS sworn.

Direct examination by Mr. Simpson:

Q. What is your business?

A. Chief Clerk to the Master Mechanic, New Durham, New Jersey.

[fol. 22] Q. Is the master mechanic the person in charge of the roundhouse?

A. No, sir.

Q. Does he keep the records?

A. No, sir.

Q. He was subpœnaed to produce the records, and I understand that you came in his stead, is that right or not?

A. I came with what I could obtain.

Q. Where did you get these records?

A. From the master mechanic's office.

Q. If he don't keep them how could you get them from his office?

A. We keep them in his office.

Q. Who keeps them?

A. The master mechanic's office force.

Q. Are you in his office force?

A. Yes, sir.

Q. What is your position in his office force?

A. Chief Clerk.

Q. Have you got the record covering engine 3709 which killed this man on the 27th of July, 1926?

A. What record?

Q. The record of when she came in and when she was to go out?

A. (No answer.)

Q. What makes you hesitate so long?

A. I have a record that shows the time she arrived.

Q. What time did she get to the roundhouse?

A. 7:50 P. M. July 26th.

Q. What was done to her?

A. That I don't know.

Q. What time was she to go out?

A. She was scheduled to go out—that depends from where.

Q. From the yard, to go to work, to pull a train out.

A. Four o'clock is the schedule time to leave Weehawken —four A. M. standard time.

Q. Four A. M. standard time?

A. Yes, sir.

Q. Have you any record, anything on your records indicating what time this man was killed, daylight or standard time?

[fol. 23] A. No, sir, I haven't those records.

Q. Who would have those?

A. Why the Claim Department, I imagine.

Q. Who would keep the record at the roundhouse? Who would be responsible for this happening, to report it?

A. The foreman.

Q. That would be Mr. Kelly?

A. I believe Mr. Kelly.

Q. And you say this locomotive came in at what time?

A. 7:50 P. M.

Q. And she did take a train out in the morning?

A. Four o'clock on the 27th, from Weehawken.

Q. Is there any record at all there as to what time she would leave the roundhouse, anything on your record?

A. What do you mean, the time she would leave?

Q. Oh no, the time she ordinarily would take a train out at four o'clock—at what time she would leave the roundhouse.

A. (No answer.)

Q. Is there any schedule of time when she was to be taken out of the roundhouse on your records?

A. Three o'clock in the morning.

The Court: Standard or daylight?

The Witness: Standard time.

Q. You are talking of standard time now?
A. Yes, sir, that is railroad time.
Q. Now, have you any record of what was done to her in the roundhouse?
A. No, I have no record of that.
Q. Your record is simply of the time she came in? Now have you got a record of the time she left?
A. The time she actually left the engine house, 3:18 A. M., July 27th.
Q. That is the roundhouse?
A. Yes.
[fol. 24] Q. 3:18 Standard time?
A. A. M.
Q. And she was to go out at three o'clock?
A. Yes, sir.
Q. Didn't go out for eighteen minutes after?
A. Right.

Cross-examination by Mr. Carey:

Q. She was scheduled to go out from the roundhouse you say at three, standard time?
A. Yes, sir.
Q. Three A. M.?
A. Three A. M.
Q. Do you know what train she was scheduled to take out?
A. According to my records W. D.-1.
Q. She coupled onto that train at Weehawken?
A. I don't know whether she did or not.
Q. You don't know where the train was located?
A. No, sir.

Redirect examination by Mr. Simpson:

Q. Who would know that, the train dispatcher at Weehawken, the time she actually coupled on?
A. I don't know.
Q. Have you got any record of the time the men reported to take the engine away from the vicinity of the roundhouse?
A. I have got the time that they are supposed to report.
Q. What time are they supposed to report?

A. Three A. M.

Q. But the time they did report you haven't any record of?

A. No, sir, I haven't that.

Recross-examination by Mr. Carey:

Q. How many men in the crew that reported to take the engine out from the roundhouse?

A. I couldn't tell you, sir.

Q. Does the train crew or the engine crew take the [fol. 25] engine out from the roundhouse?

A. Not usually, no, sir.

Q. Who takes it out of the roundhouse?

A. It is the duty, from my recollection, of the hostler to take the engine out of the roundhouse.

Q. And the time you have got here as the time when the engine was scheduled to leave the roundhouse is the time when the engine crew takes the engine, takes charge of the engine?

A. The time that I have here is the time the crew is ordered to depart with the engine from the engine house.

Q. Not the time the hostler is supposed to remove the engine from the engine house to the turntable?

A. No, I haven't that record.

Q. But the time you have given us is the time when the engine crew is supposed to take charge of the engine to leave with it for the purpose of coupling onto the train.

A. To leave the engine house, yes, sir.

Redirect examination by Mr. Simpson:

Q. The time you have given is the time the crew would take it out of the yard, whatever you call it? The hostler is the man who backed it out for the crew, wasn't he?

A. I don't know whether he did or not.

Q. Was that the custom?

A. It is the custom.

Q. The hostler takes it out there where he leaves it and the crew gets it?

A. Yes.

Q. And your record shows the time the crew was to take it there at three o'clock; they really took it at 3:18, but the

time it was backed out of the roundhouse you have no record of?

A. No, sir.

Q. And the record of the time you are giving us has nothing to do with the movement of the engine out of the roundhouse onto the turntable?

A. No, sir, it is not.

[fol. 26] CORNELIUS MCGEE sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. McGee?

A. 962 Tonnele Avenue, North Bergen.

Q. What is your occupation now?

A. Fireman.

Q. On what railroad?

A. New York Central.

Q. New York Central?

A. Yes, sir.

Q. On the 27th of July, the morning of the 27th of July, 1926, were you a hostler? You were a hostler, weren't you?

A. Yes, sir.

Q. And how long had you been a hostler?

A. I should imagine about three months, but I had been a hostler off and on.

Q. What do you do as a hostler?

A. I bring the engines out in order for the crews to take them away.

Q. Where do you put the engines for the crew to take them?

A. Out by the water plug, right by the master mechanic's office.

Q. How far from the turntable there?

A. I should imagine about three hundred feet.

Q. Would you leave it there or wait?

A. I would leave it there; put it in condition.

Q. Before the time of the accident who was in charge of the roundhouse or who was your superior?

A. Mr. Kelly.

Q. Had you made any complaint to him as to conditions around the roundhouse in reference to the men before the accident?

A. I have told him and I have told Mr. Strauss both.

Q. Who?

A. Mr. Strauss, the master mechanic.

Q. What complaint had you made?

A. About men being around by live engines, and if they happen to sit down or take a rest by a live engine when [fol. 27] I am taking it out they are liable to get either blinded or deaf from steam.

Q. When did you tell him that?

A. About two weeks previous to the accident.

Q. Any changes made after you told him that?

A. Yes, sir.

Q. What changes were made?

A. The men didn't come out and sit down there any more.

Q. Back of you?

A. In back of the dead engines.

Q. I am talking about inside of the roundhouse. You didn't see any men there?

A. No, sir.

Q. Did you make any complaint about the throttle on this engine that was in this accident?

A. Not that I remember.

Q. You never made any?

A. I have with some engines but not with this one.

Q. I am talking about this one. Your recollection is that about 3709 you didn't make any question about the condition of the throttle to anybody?

A. No, sir.

Q. What time did you get on this engine this night?

A. I figure I got on the engine about 2:20.

Q. You said you got on——

A. About 2:20.

Q. Who sent you to get on?

A. My business is——

Q. Who sent you, if anybody?

A. Mr. Kelly.

Q. Did you or would you move it without his direction?

A. No, sir, not unless he O. K.'s this.

Q. Did he tell you to get it O. K.'d?

A. Yes, sir.

Q. Then you went in there in the roundhouse before 2:20, did you?

A. About 2:20.

Q. What track was this engine on?

A. Track eight.

Q. Were there any engines on either side?

A. Yes, sir, on both sides.

Q. Both sides there were engines?

A. Yes, sir.

[fol. 28] Q. Were there any men working on them?

A. No, sir, not that I remember.

Q. Did you see any men?

A. I seen no men at all.

Q. Did you get up on the engines to make any examination?

A. No, only on my own engine.

Q. From your own engine you didn't see anybody on either engine?

A. No, sir.

Q. On either of these engines on either side of you was there steam up?

A. One was a dead one and one was steam up.

Q. Did it take the one with steam up—the engine that had steam up, did you have anything to do with it that night?

A. No, sir.

Q. Did you take it up afterwards?

A. No.

Q. Do you know what engine it was?

A. No.

Q. So as I undersand it you simply walked in and got on your engine, is that right?

A. No, sir.

Q. What did you do?

A. I walked in on the left hand side of my engine.

Q. That would bring you between your engine and what other engine?

A. I don't know the number of it.

Q. Was it the dead one or the live one?

A. Supposed to be the dead one.

Q. Do you know whether there was anybody working on it?

A. No, sir, there was nobody working on it.

Q. You didn't go to see?

A. I went around my own engine.

Q. I am talking about the other engine. You never—you have already described that you got in on the left hand side of your engine between your engine and a dead engine, and got up on your engine, is that true?

A. No, I came in on the left hand side of my engine.

[fol. 29] Q. Yes.

A. And in regard to the other engine it don't bother me.

Q. I am not talking about the other engine. I am asking you if you can describe what you did.

A. That is what I am saying.

Q. Come in and walked along the left hand side of your engine, that is 3709, and then you got up on it?

A. No, sir, there is pet cocks generally open on top of the cylinders.

Q. What?

A. If an engine moves, she can't move very far with the pet cocks open. The steam will go out of the pet cocks when they are open, and if there are pet cocks open it is my business——

Q. Will you please be good enough to tell us what you did? You got up on your engine and what did you do?

A. I got up on the engine and I started my air compressor and then I turned on the lights.

Q. Which lights?

A. The lights for the whole engine; the one dynamo controls the whole engine.

Q. What does it control, headlights?

A. Headlights, cab lights and back light.

Q. Then what did you do?

A. Then after I got my air up some five to seven pounds I put on my bell to hear the air on the bell.

Q. Were other bells ringing at the time you put on your bell?

A. I don't remember.

Q. Other whistles blowing?

A. Whistles blowing all the time.

Q. Then you did what?

Q. Then you did what? Did you start your engine in motion?

A. No, I waited until I got fifty pounds of air on my engine.

Q. How long did that take?

A. Five to seven minutes.

Q. How long were you on your engine before you put [fol. 30] the steam on and moved it?

A. Ten minutes.

Q. And that would bring you to 2:30?

A. Yes.

Q. So when you started your engine in motion it was about half past two, is that right?

A. About half past two, yes, sir.

Q. Where did you go when you started your engine? How did she go, back out or go out front?

A. Backed out.

Q. Did you know Marcone?

A. No, sir.

Q. Didn't know him?

A. No.

Q. Never seen him?

A. No, sir.

Q. You knew men were working around there, though, didn't you? In the roundhouse?

A. I knew lots of men were working in there.

Q. What did they do, work there all night?

A. They worked on shifts.

Q. What did they do? Were some of the men there all night?

A. Yes, sir, somebody there all the time.

Q. Working, is that right?

A. Yes, sir.

Q. On the engines. Now what was the first you knew that your engine had killed a man?

A. When I got notice from the turntable man he swung me up and I put her in emergency.

The Court: What do you mean, he swung you out?

The Witness: With the lamp, across the track.

Q. Did you look to see what was behind you?

A. Yes, sir.

Q. Behind your engine?

A. Yes, sir.

Q. And he was swinging for you to stop?

A. Yes, sir, and he hollered at the same time.

[fol. 31] Q. How far out of the roundhouse were you when he stopped?

A. I would say thirty-five feet.

Q. You mean the rear of the engine or the front?

A. Back of the engine.

Q. Where was the front of the engine, still partly in the roundhouse?

A. Partly in the roundhouse.

Q. How much was partly in the roundhouse?

A. I don't know how much, say about sixty feet.

Q. Of your engine was still in the roundhouse?

A. Yes, sir.

Q. And how far do you think you were with the engine before you were stopped by this signal?

A. I went about almost sixty feet.

Q. Before you were stopped?

A. Yes, sir.

Q. You never saw this man that was killed, did you?

A. Not that I recollect.

Q. I mean you never saw him the night of the accident around your engine?

A. No, sir.

Q. The first you knew was when you were stopped?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now with your engine in the position it was when you looked back or after you had gone back of your engine there was nothing to prevent seeing anybody there? It was all fully lighted up, wasn't it?

A. It is lit up from the table.

Q. In other words, there is nothing to prevent you from seeing a man if he was working on an engine next to you? Nothing to prevent you from seeing him, was there?

A. No, sir, not on the right-hand side.

Q. Or on the left-hand side, was there anything on the left-hand side?

A. No, sir, there is lights, it is lit all through the roundhouse.

Q. On which side of the engine were you on?

A. Left-hand side.

[fol. 32] Q. So that you got on the left-hand side and stayed on the left-hand side, is that right?

A. No, sir, I came over on the right-hand side to run the engine.

Q. You got on the left-hand side and then you went over to the right-hand side and then you were on both sides?

A. Yes, sir.

Q. And there was nothing whatever to prevent you looking back and seeing if anybody was working on the live engine on your right-hand side, was there?

A. No, sir.

Q. And you didn't see anybody, did you?

A. No, sir.

Q. You didn't give any warning to anybody? I am not talking of your whistle or bell now. You didn't do anything to warn anybody who might be working behind your engine, did you?

A. No, sir, but I came in from behind and I seen nobody working in behind.

Q. You came in from behind and you got on the front but you didn't, before you moved your engine, you didn't take any precaution to see whether anybody was working on the live engine and if so to give them a warning that you were going to move the engine, did you?

A. Well, I did when I went in; if anybody was working on either side I would have told them about the steam.

Q. Now, but you——

A. If anybody was on either engine.

Q. Yes, but you never saw this dead man before?

A. No.

Q. And he was hit by your engine?

A. Yes.

Q. And he was taken out dead from under your engine. Now what I ask you is, when you got on the engine—you knew that bells were ringing and whistles blowing all the time and knowing there was a live engine right along your [fol. 33] right-hand side did you give anybody any warning that you were going to move that engine?

A. No, sir.

Q. You didn't know you had hit this man, did you?

A. No, sir, I didn't know it.

Q. What was the over-hang of your tank? How close was it to the engine on your right-hand side that was alive?

A. The over-hang of the tank, you mean?

The Court: How close.

Q. You have described an engine on your right-hand side that had steam up. You don't know what the number of it was; you can't identify it; but I am trying to find out what clearance was there between your rear tank and that engine with steam up.

A. Must have been about ten feet.

Q. Ten feet clearance?

A. Yes, sir.

Q. What was the over-hang of your tank over the track?

A. About four feet.

Q. You were over the track?

A. Yes.

Q. So there must have been then the distance between the tracks according to you, if the other engine had four feet, would have been about fourteen feet between the rails, is that right, or between the tanks.

The Court: Eighteen, wouldn't it be, Senator?

A. When they are in the house side by side there is a four inch clearance between the engine and the door and with the same engine on the inside there is a four inch clearance with the door. This would give it about three foot from tank to tank.

Q. When you were stopped, then what did you do?

A. Then I put it in emergency just as soon as I stopped and jumped down off the engine.

[fol. 34] Q. Then what did you see?

A. I seen a man laying on the right-hand side of my engine with his legs out on this side of the rail outside of the rail.

Q. That is, his legs were on the right-hand side of the right-hand rail, is that right?

A. Yes, sir.

Q. When you say right-hand you mean looking toward the back?

A. No, looking toward the head of the engine.

Q. Looking toward the headlight?

A. Yes, sir.

Q. When you say say right-hand all the time you mean looking toward the headlights?

A. Yes, sir.

Q. Then as I understand you you walked in between your engine and the dead engine on the lefthand side?

A. Yes, sir.

Q. And got up in your cab?

A. No, sir.

Q. What did you do?

A. Walked all the way around my engine, back to the tank again.

Q. You walked up the left-hand side, crossed in front and walked back on the right?

A. Yes, sir.

Q. And then went behind?

A. No, I didn't go clear behind, I went right to the door and I seen there was no obstruction there so I came back to the right and got up on my engine.

Q. You walked up on the left and around front around down to the rear on the right-hand side, is that right?

A. Yes.

Q. And then you went back again?

A. I went back up on the right-hand side.

Q. You described a little while ago how you come up on the left-hand side of your engine.

A. No, sir.

Q. You did not?

A. I always get up on the right.

Q. You didn't get up on the left-hand side?

A. No, sir.

Q. As I remember you swore distinctly that you walked [fol. 35] up on the left-hand side and got up on your engine. You say that is not so?

A. No.

Q. Now your movement is, up along the lefthand side, around the front, down to the end on the right, and then in around to the back and up back—back up again on the right, and back up on the engine, is that right?

A. Yes, sir.

Q. And then you stayed always on the right-hand side, did you?

A. Yes, sir.

Q. You never got up on the left-hand side of your engine?

A. No, sir.

Q. You always stayed on the right-hand side of the engine?

A. Always on the right-hand side, yes.

Q. And this man's feet extended over the rails, is that right?

A. All but his shoulders.

Q. How far was he on the turntable?

A. He was about—well he was about between the turntable and the rails. He was half on the turntable and half on the roundhouse rail.

Q. How far out on the edge of the turntable was he? How far on the turntable, do you know? How far was his body lying?

A. Three feet.

Q. He only got three feet on the turntable?

A. Yes, sir.

Q. Did you trace the bloodstains back to see where he first got hit?

A. No, sir.

Q. You didn't go back at all in the roundhouse?

A. No, I left the engine stand and beat it to the master mechanic's office.

Q. You did what?

A. Left the engine stand there with the air off.

Q. What did you do?

A. And went to the master mechanic's office.

Q. And made a report to him?

A. Yes, sir.

Q. You didn't go back and find out where your engine [fol. 36] had been, where he had first been hit by your engine?

A. I did an hour later, but we couldn't locate it.

Q. You went back an hour later?

A. Yes, sir.

Q. What did you try to do an hour later?

A. Tried to locate where the man was hit, where he was hit, when he was hit.

Q. Did you see any bloodstains?

A. Only in between the rails.

Q. How far towards the roundhouse did the bloodstains go?

A. About thirty feet.

Q. Thirty feet in the roundhouse?

A. Outside of the roundhouse.

Q. What?

A. Outside.

Q. When you say the roundhouse do you mean the——

A. The stall.

Q. You mean the stall?

A. Yes, sir.

Q. Well, how far was the blood from the position that he was found? You say he was three feet in on the turntable?

A. Yes, sir.

Q. And the blood was about thirty feet in from where the body was found, so the bloodstains went twenty-seven feet up the tracks, did they?

A. No, there wasn't that much blood spilt.

Q. You have already described—if we can get you to be definite, that the body was in three feet on the turntable?

A. Yes.

Q. And that the blood went thirty feet from where the body was found?

A. Yes.

Q. Now if it was only three feet in on the turntable it must have been twenty-seven feet—there must have been twenty-seven feet of blood on the tracks, wasn't there?

A. Yes, sir.

Q. How near would that bring you to the edge of that stall?

A. About thirty-two feet.

Q. So there would be about sixty feet from the end of the [fol. 37] stall to where the body was found?

A. Sixty-eight feet from the stall to the turntable.

Q. To the end of the stall—from the end of the stall to the table?

A. Yes, sir.

Q. You are still working for the New York Central?

A. Yes, sir.

Q. As what?

A. Fireman.

Q. Did you find this cap that one witness described as fifty feet from the place where the body was found?

A. No, sir.

Q. You didn't find that?

A. No, sir.

Q. After you backed out of the lights—you didn't have any headlights on your rear, did you, to throw light?

A. Yes, sir.

Q. Had a headlight?

A. Had a tail light.

Q. Was it a big light or little?

A. Big light.

Q. Give you all the light you wanted?

A. Well——

Q. Did it give you enough light to see a man behind your engine?

A. Yes, sir.

Q. And you kept looking all the time?

A. Yes, sir.

Q. And you never saw a man?

A. No, sir.

Q. You looked before you moved your engine?

A. Yes, sir.

Q. And you looked while you were in motion?

A. Yes, sir.

Q. And the man's body was on the right-hand side and you never saw him until the man stopped you, is that right?

A. Yes, sir.

Q. How long had you been a hostler?

A. I was three months previous to that time, as near as I can recollect it.

Q. Had you done anything else?

A. Yes, I had been firing off and on.

Q. Did you make a written report of the accident to the master mechanic?

A. Yes, sir.

[fol. 38] Q. Who was the man you made it to?

A. I made it to—well, to what we call our dispatchers.

Q. You wrote down what happened?

A. I made the report out to Patrick Ross.

Q. Who is Patrick Ross?

A. Engine dispatcher.

Q. And he has got your written report, has he?

A. No, sir, he turned it over to the claim agent.

Q. Who is the claim agent?

A. The man is dead now; I don't recollect his name.

Q. Do you know who has that report now?

A. No, sir.

Q. Did you see it down in Mr. Carey's office? Was your memory refreshed from it in Mr. Carey's office?

A. I didn't refresh my memory from it.

Q. You saw it down there, didn't you?

A. He had something there, but I didn't read it.

Q. You don't know whether it was your report or not?

A. No, sir.

Q. You say you started to move this engine at 2:30, did you?

A. Yes, sir.

Q. Was anybody working on this engine you moved at the time you moved it?

A. No, sir.

Q. Who did you say sent you to move it?

A. Mr. Kelly; he gives me a list of our engines supposed to come out of the house.

Q. What did he tell you about this engine?

A. I asked him if it was O. K. to move it and he said yes.

Q. And then you moved it?

A. Yes, sir, moved it on schedule time.

Q. Did Kelly ask you what you backed out so early for?

A. No, sir.

Q. Did you have any conversation with Kelly about backing out early?

A. No, the only conversation I had with Mr. Kelly was, [fol. 39] "Don't wake the dead blowing that whistle, because they will come down and have us arrested."

Q. What——

A. They have an ordinance in Grandon——

Q. What did Kelly say to you and what did you say to Kelly about your backing out early?

A. He never said nothing to me.

Q. He never said nothing to you?

A. No, sir.

Q. And when was it he told you not to blow the whistle too loud?

A. He was walking through the roundhouse; that was about 2:30; he had already moved the engine.

Q. Had you known at that time that a man had been killed?

A. No, sir.

Q. Kelly didn't know it?

A. No, sir.

Q. And Kelly never said to you that you backed out too early?

A. No, sir.

Q. Was there any system or custom of warning men in the roundhouse of the movement of these engines, keeping in mind the fact that a whistle, that whistles are blowing all the time and bells sounding all the time and give no warning—was there any system or custom of warning these men concerning some of whom who had been so employed had been killed—was there any custom of warning them of the intended movement of an engine by the hostler?

Mr. Carey: I object to that question.

The Court: Objection sustained.

Q. You have already testified that you complained because there was danger of people being hurt?

A. Yes, sir.

Q. In view of that was there any custom, after your complaint, about warning men working in the vicinity of en- [fol. 40] gines about the intended movement of engines?

A. The engine was put on a blackboard; the engine was posted to go out at a certain time.

Q. That was the only warning?

A. Them men were governed accordingly.

Q. Is that the only warning that was given?

A. I don't know whether that was given or not, but that is what I surmised.

Q. You say there was a custom of writing up on a blackboard the time an engine would move?

A. Yes, sir.

Q. Whether it was done in this case or not you do not know?

A. No, sir.

Mr. Simpson: That is all.
The Court: Recess.

(Recess until two P. M.)

After Recess

JAMES H. KELLY sworn.

Direct examination by Mr. Simpson:

Q. Where do you live?
A. 30 Cornish Street, North Bergen.
Q. What is your business? What was your business on July 26th, 1926?
A. Assistant terminal foreman, nights, at the Grandon Roundhouse.
Q. Were you in charge this night?
A. I was.
Q. And this man Marcone, what was his work?
A. Box packer.
Q. What time did he go on duty this night?
A. Seven P. M.
Q. Until what time did he work?
A. Until three P. M. in the morning.
Q. What was his work during that time, what did he do?
A. Box packer, on inspection work.
[fol. 41] Q. What does that mean?
A. Well, packing journals, drive boxes——
Q. How long had he been employed in the roundhouse?
A. That I don't know.
Q. Had he been there for some time?
A. He was there as long as I was foreman—first of July.
Q. In doing this work, in packing boxes, did he have to go to the different engines on the tracks in the roundhouse?
A. Yes, sir.
Q. And put grease and oil——
A. Yes, he did.
Q. Who was his superior?
A. Robert Siddell.
Q. What was he?

A. Gang leader.

Q. And this man would do whatever he told him to?

A. Yes, sir.

Q. Now this engine that killed him, do you know what time he left the roundhouse, of your own knowledge?

A. No, not the exact time I don't.

Q. Did you send McGee for it?

A. I did earlier in the evening. An hour before that I told him O. K. to take it out whenever he got it ready.

Q. Told him what?

A. I told him an hour before she was O. K. to take out of the house.

Q. Where was she to go to?

A. To Weehawken.

Q. What for?

A. To take a train out.

Q. To where?

A. Freight.

Q. Freight to where?

A. I don't know the number. It is called the Morning Glory, but it has a number.

Q. Morning Glory?

A. Yes, sir.

Q. A freight train?

A. Yes, sir, freight train.

Q. Do you remember having a talk with McGee in which he complained to you before the accident of the conditions around the roundhouse were such that some of these laborers would be injured or killed?

A. Yes, sir, he complained about it.

Q. What did he tell you about it?

A. He told me the men had a habit of going out to cool [fol. 42] off and sitting around back of the engines in the back of the roundhouse and he would come in back, see, and he said he wanted it stopped.

Q. Came in what?

A. He always come in the back way.

Q. He came in the back way?

A. Yes, before that. I mean he crossed over the turntable and come through the back end of the roundhouse.

Q. You mean the men would come right in the roundhouse?

A. McGee did.

Q. He would do what?

A. To come in to take an engine out, he would, and that is how he discovered the men there.

Q. What system was there in the roundhouse of warning the men that an engine was going to move? How would the hostler warn them?

A. Start the bell and give three blasts of the whistles.

Q. If the whistles and bells were going all the time what kind of warning was that?

Mr. Carey: Objected to.

The Court: Objection sustained.

Q. Was that the only system you had in that roundhouse of warning the men?

A. The whistle was the warning to the men.

Q. That was the only system you had?

A. Yes, sir.

Q. Did you say——

A. I did tell McGee in the course of a conversation not to blow the whistle too hard.

Q. And did you tell him after the accident was all over, "Why did you take this engine out so early?"

A. No, sir, I did not after the accident; before the accident I spoke to him.

Q. What did you tell him before the accident?

[fol. 43] A. I had been in the roundhouse and I heard the whistle blow so loud, and I came down to the roundhouse and said to him, "Don't blow that whistle so loud or you will have us locked up."

Q. What did you do then?

A. Said not to take them out too early when it wasn't necessary.

Q. And then you came away?

A. Yes, sir.

Q. How soon after that did he take it out? What time was it when you told him that?

A. That is as I can recall sometime after two. I don't know the exact minute.

Q. You told him not to take it out too early if it wasn't necessary?

A. Yes, sir.

Q. Did you know sometimes they took them out early so they could go to sleep afterwards?

Mr. Carey: I object to that.

Mr. Simpson: Withdraw that question.

Q. You did tell him—you left him in the cab and told him not to take it out too early if it wasn't necessary?

A. Yes, sir.

Q. What was the next you knew that there had been any trouble?

A. I proceeded down the roundhouse and got to the assistant foreman, and the next I heard was this whistle blown again, three short blasts, the whistle to go on out on the turntable, and I seen it was him with the cab all lit up and actually he started to move out; and two or three minutes after that we heard the turntable man holler, and we went down, thinking the engine had gone off the track.

Q. What did you do?

A. Went back to the roundhouse and to the turntable and I saw Marcone lying there with his head off.

Q. How many men worked there at night, laborers, what [fol. 44] was the number of employees working around the roundhouse?

A. Around forty.

Q. Forty?

A. Yes.

Q. They all work from seven at night until three in the morning?

A. On that shift.

Q. There was something said about a custom of putting the time up on a blackboard that the engine was to go out. What do you know about that?

A. Yes, sir, we have a board down there telling the time the engine is to leave.

Q. What was on the board that night?

A. The time schedule for it to leave.

Q. Three o'clock?

A. The time on this board?

Q. Yes, what was on this board with reference to this engine? What time was she to leave, on the board, three o'clock?

A. I don't remember just what time.

Q. Would it be the same time she was cheduled to be out in the yard for the crew?

A. Well, yes.

Q. Who put this up on the board? Who was supposed to?

A. General foreman, days.

Q. The day foreman?

A. Yes, sir.

Q. Did you go to the place of the accident?

A. Almost to the place of the accident; I didn't go right to it.

Q. Did you see the bloodstains or anything of that kind?

A. No, I didn't.

Q. You didn't trace any bloodstains then?

A. No, sir, I didn't.

Q. What time did the train called the Morning Glory leave?

A. I don't recall that.

Q. Four o'clock?

A. Yes.

Q. And this train—referring to the train the witness has referred to as leaving Weehawken at four o'clock in the [fol. 45] morning called the Morning Glory—do you know who the crew were that took the engine out?

A. No, sir; I don't recall.

Q. Where would be the record of that?

A. In the dispatcher's office.

Q. Train dispatcher's office?

A. In the roundhouse.

Q. Would that Mr. Weiss be the man to have those records?

A. No, sir, he would not.

Q. Who would have those records?

A. The engine dispatcher.

Q. The engine dispatcher?

A. Yes, sir.

Q. You don't know anything about the accident yourself, you didn't see how it happened?

A. No, sir, I didn't.

Q. Now these forty men working in and around the roundhouse, what would be their general duties?

A. Several machinists, there were several machinsts' helpers, boiler makers, boiler makers' helper; chief metal worker and helper; and then we have laborers working on the inspection wagon; gang leader and machinists' helpers.

Q. And the immediate superior of this man killed, what was his name?

A. Robert Siddell.

Cross-examination by Mr. Carey:

Q. Where were you when you heard this loud blasts of the whistle that you mentioned?

A. I first heard it down in number one stall in the roundhouse.

Q. That is the stall down on this end (indicating)?

A. That is number one.

Q. And what track did this engine 3709 go out on?

A. I believe track seven or nine; I don't remember which one it was now.

Q. You don't remember?

A. No.

Q. Where did you go after you heard that blast of the [fol. 46] whistle?

A. I came down from the roundhouse to caution the hostler not to blow the whistle too loud.

Q. How many blasts did he blow?

A. Three, the customary.

Q. How long was it after you heard blasts on the whistle that you told him not to blow so loud?

A. Five minutes.

Q. What reason had you for directing him not to blow too loud?

A. Because I told him the North Bergen Police Department had been down there two or three times and told me if I continued he would lock me up.

Q. You say that this blackboard had the time when the engine was to leave the yard?

A. Yes, sir.

Q. But that did not refer to the time when it was to be taken out of the roundhouse?

A. No, sir.

Q. Did you get the time that this engine was scheduled to leave the yard?

A. The hostler got it in the early part of the evening when he started to work.

Q. Where was this blackboard posted?

A. In the center of the roundhouse.

Q. Center?

A. Yes, sir.

Q. At the front end?

A. Stall twelve.

Q. Stall twelve?

A. Yes, sir.

Q. That is there (indicating). And where in stall twelve was it posted, at this end here?

A. It was posted on the main wall of stall twelve, the partition wall.

Q. That was inside the roundhouse?

A. Yes, sir, inside the roundhouse.

Q. How far from the doors through which the engine passed out?

[fol. 47] A. That was at the front end of the roundhouse, the board was, in front of the engine.

Q. In front of these tracks?

A. Yes, sir.

Q. And at what time was the time posted on that board?

A. Three o'clock, I believe.

Q. No, I mean what time was the board hung up with the leaving time on it?

A. The leaving time of the engine?

Q. Yes.

A. I don't recall whether it was on the board that night or not; it was customary to; but I gave the hostler the leaving time anyhow.

The Court: The question was, what time was that board hung up?

The Witness: The board is permanent.

The Court: What time were the notations put on the board?

The Witness: Probably put on before the general foreman, days, went home. He went home at five or six o'clock

and he would put it on before he went home. In other words, the line-up for the night's work.

Q. Were all of the times that engines were to leave put on the board at one time or at different times?

A. At different times.

Q. Now about how long before the engine was to leave the roundhouse would this time be posted up on the board?

A. This particular engine was put on there before I got to work that night.

Q. Before you got to work?

A. Yes, sir.

Q. And was its leaving time posted also?

A. Yes, sir.

Q. Before you got to work?

A. Yes, sir.

Q. Who gives out the engines upon which work is to be done?

A. Well, that is determined; when an engine comes in the [fol. 48] house the engineer makes a report on a sheet and it is put on the board in front of us by the foreman.

Q. There is a gang of men who go around examining the engines and doing what is necessary fixing it to go out?

A. That is the inspection gang.

Q. The inspection gang?

A. Yes, sir.

Q. What gang was this man Marcone in?

A. In the inspection gang.

Q. In the inspection gang?

A. Yes, sir.

Q. Now who gives to the inspection gang the engine numbers that they are to work on?

A. The foreman, me.

Q. That would be in this case who?

A. Me or my assistant.

Q. So that this inspection gang has a list of the engines they are to work on?

A. Yes, sir.

Q. And given by you?

A. Yes, sir.

Q. Does that list give any notations as to the time the engines are to leave?

A. The inspector goes down to the board and gets it off the board.

Q. I am asking you this question: Does this list of engines which you give to the foreman of the inspection gang have on it the times that the engines named thereon are to leave?

A. No, sir.

Q. Does not?

A. No, sir.

Q. How many blasts of the whistle did you hear?

A. I heard six.

Q. All at one time?

A. No, sir.

Q. Where were you when you heard the first blast?

A. At number one stall.

Q. At number one stall?

A. Yes, sir.

Q. And then you went up to number eight?

A. Twelve.

Q. Up to number eight stall and spoke to McGee, did you?

A. Yes, that is it.

Q. And was it before or after you had spoken to McGee [fol. 49] that you heard three other blasts?

A. After I spoke to McGee.

Q. About how long was that?

A. That was about five to eight minutes afterwards.

Q. Did McGee blow those blasts?

A. Yes, sir.

Q. Now at the time you passed this stall number eight where McGee's engine was located, which end of the engine did you pass, the front end?

A. The front end.

Q. The front end?

A. Yes, sir.

Q. Will you state whether or not the headlight was lighted at the time you passed?

A. Yes, sir, the front end, yes, sir.

Q. Do you know whether the bell was ringing on the engine?

A. Yes, sir, I do. The bell was ringing.

Q. And where was McGee?

A. In the cab on the right side.

Q. Did you notice what was on the tracks adjacent to track eight, on either side?

A. Yes, there was a locomotive on each side of it.

Q. A live or dead locomotive?

A. One was alive and one was dead.

Q. Which one was the live one?

A. That I don't remember which was alive and which dead.

Redirect examination by Mr. Simpson:

Q. Why did you tell the hostler not to take this engine out too early unless it was necessary?

A. At times they take them out to the plug and we have a mid track there, and sometimes we have to cross over and use it to clear the engines out when the other track is plugged out, and sometimes they get them out there on the mid track and we have got to move them over again; and at other times we have got——

[fol. 50] Q. That is why you told him not to take it out too early, unless it was necessary?

A. Yes, sir.

Q. And five minutes after that he did take it out?

A. Yes, sir.

Q. Five minutes after you told him not to take it out too early unless it was necessary and went away?

A. Five minutes after that I saw it backed out.

Q. What is the name of this day foreman?

A. Mr. Hesson.

Q. How long has that system been in vogue there, of writing the time of leaving on the board so the men can see the time of leaving?

A. Ever since I have been there.

Q. How long have you been there?

A. Since the first of July two years ago.

Q. This first of July it is two years?

A. Yes, sir.

Q. So during all the time you have been there that has been the system?

A. Yes, sir.

Recross-examination by Mr. Carey:

Q. About what time was it, Mr. Kelly, when you first spoke to Mr. McGee?

A. I don't recall; I didn't look at my watch; I can't just tell you the exact time.

Q. Do you know about what time it was when you learned this accident had happened?

A. No, I couldn't tell you that either. I was too excited to look at the time.

Redirect examination by Mr. Simpson:

Q. There was a written record made by you or McGee in July of the exact time of the accident, wasn't there?

A. Yes, sir.

Q. That is in the possession of the company?

A. Yes, sir.

[fol. 51] Cornelius McGee recalled.

Cross-examination by Mr. Carey:

Q. Mr. McGee, you say it was about 2:20 when you first went to the engine number 3709?

A. Yes, sir.

Q. And is that standard or daylight time?

A. Standard.

Q. How long after you went there was it before you got in the cab of the engine?

A. How long before I got in the engine?

Q. After you reached the engine how long was it before you got in the cab?

A. I should imagine about five minutes.

Q. You came, as I understand it, on the left side of the engine?

A. Yes, sir.

Q. That is, you came in by track number one?

A. Yes, sir.

Q. And what track was it that you- engine was on?

A. Track eight.

Q. You walked to track eight on the rear of the engine?

A. Yes, sir, on the left-hand side.

Q. And you turned into stall eight on the left-hand side?
A. Yes, sir.
Q. Facing the front?
A. Yes, sir.
Q. And walked up the side of the engine?
A. Yes, sir.
Q. Now as you came into stall eight what was the position of the rear end of the engine tender?
A. The engine tender was sticking out about four foot.
Q. About four foot outside the door?
A. Yes, sir.
Q. And as you came up there could you see along the rear of the tender?
A. Yes, sir.
[fol. 52] Q. Was anybody at the rear of the tender when you came there?
A. No, sir.
Q. Now you walked up the left-hand side again.
A. Yes, sir.
Q. When you got to the cylinder you said you did something to the cylinder cock.
A. To see if the pet cocks were open. They generally screw them off a little bit.
Q. And you attended to that, did you?
A. Yes, sir.
Q. Was it necessary to close that before you took your engine out?
A. Yes, sir, it is unless you don't move very fast, the steam escapes out through the porthole.
Q. What did you do, pass around in front of your engine?
A. Yes, sir.
Q. To the right-hand side?
A. Yes, sir.
Q. And after you got around to the front what did you do then?
A. I went all the way to the back. There are chains underneath the wheels on both sides.
Q. Chains?
A. Yes, sir.
Q. Underneath what wheels?

A. Underneath the main drive. A couple of chains there, and in order for me to walk around the whole engine it is necessary for me to walk around——

Q. And you did that that night?

A. Yes, sir.

Q. And walked back to the rear of the engine?

A. Yes, sir.

Q. Now, at the time you walked around this engine, from the time you came to it on the left hand side until you came to the rear of the engine on the right hand side, was anybody working on that engine?

A. No, sir.

Q. When you pulled out those chains from the drivers, you could see under the engine, couldn't you?

[fol. 53] A. Yes, sir, I looked under the engine for all obstructions,—probably they leave a board under there or something.

Q. Who leaves something under there?

A. A box packer or men working underneath the engines. If they do I go find that man and make him take that board out, or whatever he put in there.

Q. It is a part of your duty to look under your engin to see if anything is underneath?

A. Yes, sir.

Q. And you did that that night?

A. Yes, sir.

Q. And you saw nobody underneath or around the engine?

A. Nobody.

Q. On which side of your engine was this, was the live one?

A. On the right hand side.

Q. That would be on what track?

A. On track number seven.

Q. On track number seven?

A. Yes, sir.

Q. So the live engine was on track number seven?

A. Pardon me. Track number nine—it starts from this way (indicating).

Q. Track number nine?

A. Yes, sir.

Q. Was anybody working on that engine when you were around there?

A. No, sir.

Q. And the engine on track number seven was dead or alive?

A. Dead.

Q. What do you mean by a live engine?

A. An engine that is fired up, and a dead engine is an engine put in for a wash-out and the fire taken out of it.

Q. After going around to the rear of the engine, after passing in front of it and removing the chains, and looking underneath for anything that might be underneath the engine, what did you do?

A. After I seen everything was clear I got up in my engine and started my air compressor.

[fol. 54] Q. Was there anybody around the rear of the tender of your engine?

A. No, sir.

Q. At any time after you arrived there that night and before you got onto the engine?

A. No, sir.

Q. You started your air compressor?

A. Yes, sir.

Q. What is that?

A. That is in order to pump up air to apply brakes on your engine.

Q. It is an engine, is it?

A. It is an air pump.

Q. And how is that pump operated?

A. That pump is operated by steam pressure.

Q. Steam from the boiler?

A. Yes, sir, boiler head.

Q. And does that make any noise?

A. Yes, sir, makes considerably noise.

Q. How far can it be heard?

A. You can hear it at least thirty or forty feet.

Q. How long did you operate that pump?

A. I operated that pump until——

The Court: No, how long did you operate it?

The Witness: When I went on the engine I put it on and it was on when I left the engine outside, sir.

Q. When you left the engine outside it was still going?

A. Yes, sir.

Q. How long had it been operating before you moved the engine out of the engine house?

A. From five to seven minutes.

Q. Now, did you turn on the lights on the engine?

A. Yes, sir.

Q. How many?

A. You turn on one dynamo and that puts on all the lights.

Q. How many lights are there?

[fol. 55] A. There is a head light and a back light and cab lights—I should imagine about twelve lights altogether.

Q. And you turned all those on?

A. Yes, sir.

Q. Where an engine is standing—where a live engine is standing in the house and there is no hostler on it are the lights turned on that engine?

A. No, sir, they are turned off unless a pumper gets on.

Q. And the hostler turns the lights on, does he?

A. Yes, sir.

Q. After turning the lights on, you did what?

A. After I turned the lights on I put on my bell.

Q. You put on your bell?

A. Yes, sir.

Q. How is the bell put on?

A. The bell is rung by air from the air compressor, and then I gave three blasts of the whistle.

Q. And where was your engine standing at the time you gave these three blasts?

A. Standing in the center of the stack in the round-house—that is the smokestack.

Q. The smokestack was in position where it ventilated properly overhead?

A. Yes, sir.

Q. And how near to the front of the track was the front of your engine?

A. About six inches from the block.

Q. After giving three blasts of the whistle—by the way, what does three blasts of the whistle mean?

A. That means to back up to give a warning to the men on the table that you want to come out.

Q. And the man at the table sets the table for the particular engine that blows the whistle for him, is that right?

A. Yes, sir.

Q. Did the turntable man respond to your signal?

A. No, sir, he was down in the pit, and he was cleaning [fol. 56] the pit and when I blew the whistle and then Mr. Kelly came along and asked me why I blew the whistle so long and I said, "That man down there must be deaf; he won't give me the table."

Q. When you were sitting in the engine and backing it out of the place where were you looking?

A. I was looking back.

Q. And as you were looking back from your position in the cab—the tender of the engine cut off your view of the track for a little distance?

A. For a little distance, but I can always see the table.

Q. You can always see the table?

A. Yes, sir.

Q. About how far does the tender on the engine cut off your view of the track?

A. I should judge—I imagine about twelve feet.

Q. About twelve feet?

A. Yes, sir.

Q. And about how long was it from the time you took your place in the cab before you started to back out?

A. Ten minutes.

Q. And about how far from the engine house doors was the rear of your tender when you stopped?

A. When I stopped, about thirty-five feet. I stopped just to clear the door so we can look out of the cab and look all around.

Q. Why did you stop there?

A. I didn't have the table; and I moved out slow so that the man could come around and give me the table or else I could holler to him.

Q. Did you give any other warning that you were going to back out?

A. When he gave me the table I blew three blasts again.

Q. About how fast did you move when you moved back the first time?

A. About four miles an hour.

Q. And about how fast when you moved back the second [fol. 57] time?

A. About four miles an hour the second time again. You can't go very fast on account of the table.

Q. Do you know the distance from the roundhouse doors, or rather from the stall doors to the turntable?

A. About sixty-eight feet.

Q. Then, as I understand you, it was about 2:30 when you started to back the engine out?

A. Yes, the engine was registered for 3:15.

Q. What is that?

A. The engine was registered to go to work at 3:15.

Q. Registered for what?

A. To go to work at 3:15.

Q. Where did you get that information?

A. Well, I have been on the Morning Glory and all the men that I have been with all drive it out of there at the same time, 3:15 standard time.

Q. 3:15 from what point?

A. Grandon roundhouse; that is the time a man registered to go on his work, fireman and engineer.

Q. The man with the records, as I recall it, said it was registered to leave there about there o'clock?

A. Well, he might have left there at three o'clock, but the way we generally time we registered at 3:15

Q. How long had you been acting as hostler?

A. About three months to the time that happened.

Q. And had you had charge of this engine on track eight which was to go out to take the Morning Glory out before that time?

A. Yes, sir.

Q. And what was your usual time of taking the engine out?

A. I always deliver an engine out half an hour before leaving time.

Q. Do you know what the custom was with the other hostlers?

A. Yes, sir.

[fol. 58] Mr. Simpson: I object to that.

The Court: Objection sustained.

Q. Did you take out this engine on the night of the accident at about the usual time?

A. Yes, sir.

Mr. Simpson: I object to that, if your Honor please. That is a matter of opinion. Testimony is already in the case, and that is the important part of this case, that the time the engine was to leave was up on a board; and that is a matter of fact and not an opinion as to his usual time.

Mr. Carey: I withdraw the question.

Q. Did you take this engine out this night at about the usual time you are accustomed to take the engine out for this particular train?

Mr. Simpson: I object to that. That is a conclusion. The testimony in this case is that men in the roundhouse got warning of the movement not by bells or whistles but by something on the board.

The Court: The jury will remember what was testified to. This witness has already said that he took the engine out at twenty minutes to three, I think it was—the testimony as I remember it—— As I say, the jury will take its own recollection as to what the testimony is; that he got on the engine about half past two and took it out about twenty minutes of three. He has further testified that he did the same thing every day for the Morning Glory. I will sustain the objection.

[fol. 59] Mr. Carey: May I have my objection noted?

The Court: Certainly.

Q. Do you know about what time it was, Mr. McGee, when you were stopped by Mr. Maloy, the turntable man?

A. It must have been about 2:40.

Q. And how long a time was it between the time when you first stopped and the time when you made the second stop?

A. About 2:30 is when I started the engine moving and then when he give me the signal I had to wait from five to seven minutes at the most for him to give me the table and signal, which took up almost ten minutes more.

Q. At the time you were backing out—from the time you first started until you were notified of the accident was there anybody working on the engine on track nine?

Mr. Simpson: I object to that, if the Court please. I don't object to his saying he didn't see anybody.

The Court: Objection sustained.

Q. Did you see anybody?

A. No, sir.

Q. Did you look to see?

A. Yes, sir.

Q. Did you see anybody working on the engine on track seven during that period?

A. No, sir.

Q. Did you look to see as you passed along?

A. Yes, sir, I warned the men about the steam if they are working there.

Q. What about the steam?

A. Steam—for instance, an employee—if an engine full of water—if you open the throttle on an engine full of water she will either blow out a cylinder head or else she won't move; and if you want her to move you have got to give her a lot of throttle; and that is the reason we have [fol. 60] cylinder throttles upon there, to prevent water and steam from being in the engine in order to make the engine move.

Q. What was the condition of this engine when you started out with it?

A. In what way, Mr. Carey?

Q. General condition,—was there anything the matter with her?

A. No, sir, she was O. K.

Q. Everything in good condition?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. Did you testify this morning that you had no conversation with Kelly about moving out earlier? Did Kelly come to you and tell you not to move that engine out too early?

A. I don't remember.

Q. You say he didn't tell you not to move it too early?

A. I couldn't say.

Q. Were you through when you moved this engine?

A. No, sir.

Q. You weren't through?

A. No, sir.

Q. You did look for men in the vicinity of your engine?

A. Yes, sir.

Q. And you looked for them for the purpose of warning them?

A. Yes, sir.

Q. And you didn't see anybody?

A. No, sir.

JOHN MALOY sworn.

Direct examination by Mr. Simpson:

Q. Were you the turntable man the morning of this accident?

A. Yes, sir.

Q. Did you move the turntable for this engine?

A. Turntable for 3709?

Q. Yes.

A. Yes, sir.

Q. Why didn't you move it the first time he gave you the signal?

A. I was cleaning out the pit. I was going over the pit [fol. 61] to let the engine out and I said, "By the time you get over her- I will be ready."

Q. Why didn't you move it out at the time you got the first signal? Did you hear the first signal?

A. Yes, but I was down in the pit oiling the rail.

Q. You were down in the pit because you didn't expect that engine out so soon?

A. Yes. Then I got up——

Q. Wait a minute. Listen to the question. You were down in the pit?

A. Yes.

Q. To do some work because you didn't expect that engine out so soon, did you?

A. No, I didn't expect it out.

Q. You didn't expect her out?

A. He told me he was going to get the engine out and I said, "All right, where you going?" and he said, "On track eight"; and I swung the table around.

Q. Why didn't you expect her out?

A. She was going out; I didn't know what engine is going out.

Q. You said you didn't expect her out, as I understand your testimony, and that is the reason you were down in the pit. Now why didn't you expect her out? Was it too early for to come out or what?

Mr. Carey: I object.

The Court: What is the objection?

Mr. Carey: The objection is that counsel is leading his witness.

Mr. Simpson: Working for the defendant?

The Court: He is your witness.

Mr. Carey: I object to that remark, if the court please.

The Court: It will be stricken out.

[fol. 62] Q. You said that you didn't expect her out. Were you down in the pit when the first signal was given?

A. Yes, sir.

Q. Did you hear the first signal?

A. Not the first time, no.

Q. You didn't hear the signal?

A. I heard it the second time.

Q. You heard the signal the second time?

A. Yes, three blasts.

Q. Where were you when you heard it the second time?

A. Up turning the table around.

Q. To operate the table?

A. Yes, sir.

Q. How did you operate it?

A. Was turning her around to track eight.

Q. What was the first you knew there was any accident?

A. I gave him the table and the lights were lit; and I gave the signal to back up and he took my signal. The table was all right because he couldn't get off the table, you know. I got to stay there and watch it. So I stayed there and I seen him coming out and I said, "There is something dragging on that engine"; and I swung him up and stopped.

Q. What did it look like that was dragging?

A. I didn't know until I got down with the lamp and found it. I said, "There is a man under there"; and I went up in the air.

Q. How far was the engine away when you first saw something dragging?

A. I was out on the table.

Q. Were you or the engine?

A. No, the engine wasn't.

Q. How far away, when you first saw something dragging, how far away was the engine from the table?

A. I couldn't say. I heard it.

Q. You heard it dragging?

A. Yes, I took my lamp along there to look to see if she [fol. 63] was off the track.

Q. You couldn't see this engine?

A. The engine was backing out.

Q. What was it you couldn't see?

A. I couldn't see under the engine until I got up there and looked under.

Q. You heard something dragging?

A. Yes, and I swung him up right away.

Q. When you stopped him you found there was a body underneath?

A. Yes, I said, "There is a man under there."

Q. How is this turntable operated?

A. By electric.

Cross-examination by Mr. Carey:

Q. Did you see McGee when he came in to go into the engine stall number eight?

A. Sir?

Q. Did you see McGee when he came in by the turntable to go into the stall number eight?

A. Going across the table?

Q. He crossed the table, didn't he?

A. Yes, sir.

Q. And you were in the pit?

A. Yes, sir.

Q. And he said to you that he was going to take an engine out on track eight?

A. Yes. I said, "By the time you get it there I'll be ready."

Q. You heard a signal, did you?

A. Yes, sir.

Q. What was the first signal you heard?

A. I heard three long blasts of the whistle.

Q. What does that mean?
A. And the bell ringing. I heard the bell ringing too.
Q. At the same time?
A. Yes, sir.
Q. Where was the engine tender?

Mr. Simpson: He hasn't told us yet what the three blasts mean.

[fol. 64] Q. What do the three blasts of the whistle mean?
A. Back up.
Q. Back up? And to you it meant what?
A. To give the signal with a lamp.
Q. It meant to you that he was ready to come out?
A. Yes, I gave him the signal then to back out.
Q. Did you notice whether or not there was any light on the rear of the engine?
A. There was a tail light on the tank, yes, sir.
Q. There was?
A. Yes, sir.
Q. When you got out to set the turntable——
A. Yes, sir.
Q. Where was the tender of the engine with respect to the doors of the roundhouse?
A. Out by the door—about three feet.
Q. What?
A. About three or four feet outside of the door.
Q. And you were standing on the turntable?
A. Yes, sir. I can't leave there, you know.
Q. And you had set the turntable for the engine to come out on track eight?
A. Yes.
Q. Now you heard something that caused you to give him the signal to stop?
A. Yes, sir.
Q. And to stop right off?
A. Stop right away.
Q. And then you looked for something underneath the engine?
A. I ran over with a lamp to see if he was off the track or something, or if there was something dragging there, and there was a man under there.
Q. I wish you would come down to this diagram and show us on this diagram of the engine about where the body was

when you found it—before you do that will you tell us on which side of the track eight this body was found?

A. On the right-hand side.

[fol. 65] Q. On the right-hand side looking toward what?

A. Backing out.

Q. When you say it was on the right-hand side, on the right-hand rail, which direction were you looking?

A. I was looking at the table, watching the table. I was on the table.

Q. You were on the table, and what direction were you looking?

A. Toward the engine.

Q. Towards the engine?

A. Yes, sir.

Q. Now the body was found on the right-hand side?

A. Yes, sir.

Q. On the right-hand rail?

A. Yes.

Q. Of that track eight?

A. Yes.

Q. Now will you point out on this diagram on the engine about where?

A. Backing on to track eight. I stood right here (indicating).

Q. You stood right on the turntable?

A. Yes, right here.

Q. Were you——

A. I heard something dragging and I swung him up, then——

Q. Then you later found the body?

A. Yes.

Q. You see this diagram of the engine here?

A. Yes.

Q. Can you see that?

A. Yes.

Q. This is the front end?

A. Yes.

Q. And this is the back end?

A. This is the tender.

Q. Now will you show us about where on this tender you found that body?

A. Right up in here; right between the first pair of wheels coming out.

Q. Now will you make a mark there where you found the body? Make a cross there.

A. Right here (making mark on diagram).

Q. Right there between those two wheels?

A. Yes.

[fol. 66] Q. All right. Go back to the chair now.

A. (Witness resumes the stand.)

Q. How long had you been working in that roundhouse, and at the turntable?

A. Going on five years, about five years next August.

Q. When you set the turntable did you see anybody around the rear of engine 3709?

A. No, sir.

Q. Did you look at the rear of the engine?

A. Yes, sir; I couldn't see into the roundhouse, you know, at all, backing out—I couldn't see in there from the table.

Q. You couldn't see in the roundhouse?

A. No, it was too far.

Q. I wasn't asking you about the roundhouse. Now about how fast did that engine come out?

A. Well, she was going very slow, just about as fast as a duck could trot. You can't come very fast out of that house, you know. You have got to go very, very slow in and out.

The Court: How fast does a duck trot?

The Witness: About a nice walk is all. They never go fast out of the house.

Q. How is this roundhouse lighted?

A. With electric lights, like this here (indicating lights in the court room) all around the front part of the engine. It was all light around there, and then there is a couple of flash lights from the wall to the back, which you can't see very well; they blind you. I don't go in there very much.

Q. Are there any lights in the rear of the engine?

A. Yes.

Q. Electric lights?

A. Yes.

Q. Any lights on the turntable?

A. Yes.

Q. How many?

A. There is one on the wheel, and there is one on the left-hand side of the table and there is one on the right-

[fol. 67] hand side on the other end. There are about three lights on the table, three or four.

Q. Did you notice whether the bell was ringing or not?

A. Yes, the bell was ringing.

Redirect examination by Mr. Simpson:

Q. You said it almost blinded you, what did you mean by that, in the roundhouse?

A. When you are looking from behind the tank your eyes—you can't see.

Q. What lights?

A. Big bulls eyes.

Q. What lights blinded you?

A. Back end of the engine, the lights on the back end of the engine.

Q. Dazzled you so you couldn't see, is that what you mean? You said blinded—don't get impatient—I am using your own language—you said it was so light in the roundhouse it blinded you. What did you mean by that?

A. When you go in there—you can work in front but when you walked in you can't see nothing.

Q. Can't see anything?

A. You walk right against it.

Robert H. Siddell sworn.

Direct examination by Mr. Simpson:

Q. What was your position on the 27th of July, 1926? Where did you work?

A. New York Central, Grandon.

Q. What was your position?

A. Gang leader.

Q. Of what, the roundhouse?

A. Of the little inspection gang.

Q. In the roundhouse?

A. Yes.

Q. What did you do in the roundhouse, take care of all the engines from Weehawken?

[fol. 68] Mr. Carey: Objected to as leading.
The Court: Objection sustained.

Q. What did you do in the roundhouse? What was your work there?
A. Inspecting the engines.
Q. What engines?
A. Any engine I was ordered to inspect.
Q. How many engines were in the roundhouse?
A. At times a dozen; sometimes there were thirty-two.
Q. All freight or all passenger or all kinds?
A. Mixture, freight, passenger and switch.
Q. Were you boss of this man? Were you over this man who was killed?
A. I wasn't boss; only gang leader.
Q. What is gang leader?
A. To show them what to do and how to do it.
Q. What did you show him what to do that night that he was killed?
A. I didn't have to.
Q. What was his work?
A. Packing boxes—grease for the drivers.
Q. He knew his work and that is what he did?
A. He did know his work.
Q. Did he do it to all the engines or only to the engines you selected?
A. Engines I selected for him.
Q. What?
A. Engines that I selected for him—fourteen up to 3835—we had done fourteen engines.
Q. Do you know how many he had done when he was killed?
A. He had done the last one I had ordered him to do.
Q. That would be the fourteenth for him?
A. Yes.
Q. Do you know which one that was?
A. 3835.
Q. Is that the one that killed him?
A. No, sir.
[fol. 69] Q. Then he worked on fourteen engines, did he?
A. Yes.
Q. And he finished the last one?

A. Yes, sir.

Q. And he could then go home?

A. He could not.

Q. What did he have to do?

A. He had to first wait until three o'clock and wait until I come in from the farm.

Q. He had to wait there until you told him he could go home?

A. Yes, sir.

Q. But he had done all the work it was necessary for him to do?

A. When I came in and looked then the work was all done.

Q. When you came in and looked it over?

A. We went out on the farm about 2:15. We had about twenty minutes work. I came in about 2:35.

Q. You got in about 2:35?

A. Yes.

Q. Did you see him there then?

A. No, he wasn't there.

Q. Were you present at the time of the accident?

A. I was out on this what we call the farm, the spur.

Q. There is no cover over that in summer time. In summer time we have a couple of engines like that that don't require to go into the pit maybe once a week.

Q. How far was this farm from the roundhouse?

A. Just suppose the circle of the roundhouse, just double that and that is where I was out on that circle.

Q. What was the first you knew of the accident?

A. When I came in I started to write out my reports.

Q. What did you find?

A. I didn't find anything.

Q. Did you see the condition there?

A. No.

[fol. 70] Q. You had no personal knowledge of the accident?

A. I had none, no.

Q. When was the last time you saw him alive?

A. When I was going out to the farm I gave him his instructions.

Q. What instructions?

A. What to do.

Q. What time did you go to the farm?

A. About 2:15.

Q. He was through then, wasn't he?

A. He was not. He had not done 3835. He was through, but he only begun when I was done.

Q. Did you see him after he was finished with all his work?

A. No, sir, I didn't see him until he was dead.

Q. What time he really finished you don't know, what time he finished all his work?

A. I came in and looked at the work at about twenty minutes of three o'clock, after I had been notified that there was an accident.

Q. And it was all finished then?

A. Yes, then the one I gave him, 3835 was done.

Q. How long had he been under you in your gang?

A. He came off the day gang onto me; I couldn't say exactly; I guess I must have had him about a year.

Q. Did he only do this box packing or did he do other work besides box packing?

A. Yes, sir, all his work was just packing—if I asked him to do other work, of course.

Q. What was the other work?

A. To fill grease cups.

Q. On engines?

A. Yes.

Q. Anything else?

A. That was all.

Q. Box packing and filling grease cups?

A. Box packing.

Q. And filling grease cups?

A. Only on request.

[fol. 71] Q. But on request he did it?

A. Yes, any man will do that.

Q. His particular line of work was box packing?

A. Yes.

Q. But he would do whatever you told him besides box packing?

A. Any man has to do that.

Q. And his work was confined entirely to this roundhouse, was it?

A. Yes, sir.

Q. And how many engines were in the roundhouse this night?

A. I couldn't tell you.

Q. You don't know that?

A. No, sir.

The Court: What stall was 3835 in, do you know?

The Witness: Stall seven.

Cross-examination by Mr. Carey:

Q. Had Marcone worked on 3709 that night?

A. Yes, sir.

Q. What had he done on that engine?

A. He packed the boxes, re-doped the engine's trucks, oiled the trailers and oiled the tank boxes.

Q. What time that night did he work on 3709?

A. Before he went to supper.

Q. What time did he go to supper?

A. Eleven o'clock P. M.

Q. You are speaking all the time of standard time?

A. Standard time.

Q. So he had completed all the work on 3709 about eleven o'clock?

A. About four hours before, yes, sir; about eleven o'clock, before we went to supper.

Q. Before you went to supper?

A. Yes, sir.

Q. And you say he had completed the work on 3709 about four hours before quitting time?

A. Yes, sir.

Q. And quitting time was what?

A. Three A. M.

[fol. 72] Q. You gave him directions with reference to working on 3835?

A. Yes, sir.

Q. Which was in stall seven?

A. Yes, sir.

Q. And you spoke about going out on the farm?

A. Yes, sir.

Q. Was that before you went on the farm?

A. Yes, sir, before I went on the farm I gave him his instructions.

Q. And what instructions did you give him?

A. He had joined us just when I was finishing 3835. I looked over the engine truck wheel and called to him. I said, "I am going on the farm, Joe; finish this engine and then wait for me."

Q. Wait for you.

A. He would have to wait until I come back—"Then wait for me."

Q. He was not to leave that place then where he was working on 3835 until you returned?

Mr. Simpson: I object to that as a conclusion.

The Witness: Exactly.

The Court: Strike it out.

Q. Then your direction to him was not to leave that place where he was working until you returned?

Mr. Simpson: I object to that as a conclusion. I don't object to what he told him, the actual words he used to him. I don't object to that—I withdraw the objection.

Q. (Question repeated by stenographer.) "Then your direction to him was not to leave that place where he was working until you returned?" Was that your direction to him?

A. Yes, I said, "I am going on the farm; finish 3835 and wait for me."

Q. Did you have anything to carry tools on?

A. Yes, we have an inspection wagon.

[fol. 73] Q. And what tools were carried on that? Were Joe's tools carried on the inspection wagon?

A. Yes, at that time we had place on the end for his buckets. He had one end of it to himself.

Q. And what tools did he have?

A. He had two buckets, one for used dope and one for new dope. Then we had a box that we carried the grease in for his cellars, and he also had a receptacle for his cellar keys, and such things as he used in his business.

Q. That cart was moved around through this roundhouse?

A. Yes, sir.

Q. And where was it used; in front of the engines or in the rear of the engines?

A. In front of the engines.

Q. That is around this place here?

A. Yes.

Q. What is the flooring there on this space in front of the engines?

A. Concrete.

Q. You spoke about going out on the farm and that, I understand it, is out in the open space?

A. That is it exactly. We call it a farm for a nickname.

Q. And you told him to finish the work on 3835?

A. Yes, sir.

Q. And did you see him from the time you left to go out on the farm until after the accident?

A. No, sir.

Q. When you came back to look at the engine did you look to see whether his work on that engine was completed or not?

A. No, not right away I didn't.

Q. When did you look?

A. When the assistant foreman came and notified me that a man had been killed on the turntable.

Q. Then you looked at 3835?

A. I was writing in the book and——

[fol. 74] Q. I am asking you if after he made that inquiry you looked to see whether Marcone's work on 3835 had been completed?

A. Yes.

Q. What did you find?

A. I found it had been done.

Q. Had you assigned any other work to him than the work on 3835?

A. No, sir.

Q. Was there any further work for him to do after he had completed 3835?

A. Not until he got two orders, no, sir.

Q. Not until what?

A. He would have to get two orders when I come in.

Q. Did you have any further work for him to do that night before quitting?

A. No, not that I knew of then.

Q. Now, how is this roundhouse lighted at night?

A. Well, she has lights in the top; she has two for each stall, one over the pit; she has two lights; and she has lights along the top.

Q. What do you mean by lights along the top?

A. In front.

Q. In front of the engines?

A. Yes.

Q. Around there?

A. Yes. At that time there used to be lights at the head of the stalls, but I think those lights are gone now; they have heavier ones up above.

Q. And what other lights are there around there?

A. In the house?

Q. Yes.

A. There is a flood light over the tanks in the center; the stalls all have their two lights.

Q. How near the rear of the stall is the rear light?

A. Inside of the house? I would say it is about from here to that little sideboard, maybe fifteen feet from the wall —maybe ten feet—twelve feet—something like that.

Q. From the doors of the roundhouse?

A. Yes.

[fol. 75] Q. Is about fifteen feet inside?

A. Inside.

Q. Inside the doors? Now what lights are there around the turntable inside?

A. There is lights on the turntable; I don't know whether there is two—there is lights on the turntable shanty—only one on the turntable. There is a shanty. There is lights over that turntable on the shanty, over the tip, or the flooding out light that as he swings around it floods right on the rails.

Q. And what are these lights that you have spoken about?

A. What lights do you mean, in the house?

Q. The lights that you have been telling us about?

A. They are electric lights.

Q. How large?

A. Well, I just couldn't tell you what power they are; they have a reflecting thing above them that throws the lights down over the workmen or over that walk-way in between; but the power of them I couldn't tell you that be-

cause I don't have nothing to do with the electric part of it.

Q. Are there any large lights out in the yard, around the section you spoke of as the farm?

A. Not the farm proper, but at the head of the farm there is a tall pole with flood lights on that, a couple of them. They shine down on the farm and in coming over the turntable they are over a pole about seventy-five feet high—seventy feet anyway.

Q. How many of those poles are there?

A. Only one I know of. There are some down in the ash pit, but they are not for the roundhouse.

Q. How far is that from the roundhouse?

A. Oh, that is two hundred yards.

Q. What?

A. About two hundred yards, I guess.

Q. Is there a second large light out in the open?

[fol. 76] A. There was one at that time, at the head of the turntable, but I think they have taken that pole down. I am not so positive. That is what I am talking about—at the time that the accident happened there was a large light near the turntable besides the two at the end. There is one right at the entrance to the turntable.

Q. How high is that light?

A. Only about half as high as the big flood one, we will say maybe thirty-five feet.

Q. How many lights on that pole?

A. I believe there was only one. I didn't pay so much attention to it. It was a heavy one.

Q. Did Marcone make out any report of the work he had done that night?

A. He didn't have time to make out any report. I took care of that.

Q. You took care of that?

A. Yes, sir; I told him what to do.

Q. Did you inspect his work?

A. Yes.

Q. You knew what he had done?

A. Oh, yes.

Redirect examination by Mr. Simpson:

Q. Did you tell those men to finish the work on this engine and come over to you at the farm?

A. No, sir.

Q. Didn't the men at the farm when you were writing in the book say to you all you men were——

A. What is that?

Q. Did you have any of your men at the farm with you?

A. I certainly did.

Q. How many did you have?

A. The machinist's helper, the cab man and Dick, the laborer.

Q. And where were the rest of your men?

A. One was working on the cylinder cock on the——

Q. This engine you left him working on was right next to track eight, was it?

A. Yes, sir.

[fol. 77] DONATO MARCONE sworn.

Direct examination by Mr. Simpson:

Q. Your son is Joseph Marcone, or was, was he?

A. Yes, sir.

Q. What is your name?

A. Donato Marcone.

Q. How old are you?

A. Fifty-six.

Q. Is your wife alive, the boy's mother?

A. Yes, sir.

Q. How old was the boy that was killed?

A. Twenty-four.

Q. How much money did he make a week?

A. Twenty-eight dollars a week.

Q. Did he bring it home?

A. Yes, sir.

Q. And you gave him his food and clothes, is that right?

Mr. Carey: Objected to.

Cross-examination by Mr. Carey:

Q. You say he made twenty-eight dollars a week, your son?

A. Yes.

Q. And where did he live? Did he live with you?

A. Yes, he lived with me, I lived with him.
Q. How much did he pay for his board?
A. No, no, no board.
Q. What?
A. Don't pay board, he give it to me, the money.
Q. You gave him his board?
A. He didn't board at my house.
Q. He didn't board at your house?
A. No.
Q. Did your son live at your house?
A. (No answer.)

The Court: I think we had better have an interpreter.

(Examination continued through an Italian interpreter.)
(Question repeated.)

[fol. 78] A. Yes, always.
Q. Always lived at your house?
A. Yes.
Q. Did he pay you fifteen dollars a week?
A. No, sir; he gave me twenty-three dollars per week and then he take five dollars for himself. That is all.
Q. You were working also?
A. Yes, I worked there fifteen years.
Q. How much were your wages?
A. Same, twenty-eight dollars, same pay as my son.
Q. You were not dependent on your son, were you?
A. Well, he helped me. Now I am not doing much; I am——
Q. You are still working, aren't you?
A. Yes.
Q. Getting the same wages?
A. A dollar less.
Q. Twenty-seven dollars a week?
A. Yes.

JAMES H. KELLY recalled.

Cross-examination by Mr. Carey:

Q. Mr. Kelly, are you familiar with the lighting of the roundhouse at the time this accident happened?
A. Yes, sir.

Q. Won't you tell the jury how it was lighted?

A. Well, from the center over each stall outside the track is a one hundred bulb light, and at the end of each stall there are two flood lights that flood it this way, at the back end of the house, and in the front of the house there are two flood lights that go that way at each stall; the entire roundhouse is equipped that way.

Q. Those lights give good light in the roundhouse?

A. Yes, sir; and when they are out it is my duty to see that new ones are put in.

Q. How is the space around the turntable there outside of the roundhouse lighted?

[fol. 79] A. There are three lights on the turntable, a flood light on each end, one in the center of the turntable cabin; there is a small bulb on the outside and then at the pole with three flood lights at the outgoing track of the turntable.

Q. Will you come down and point to the position of the flood lights on the diagram?

A. The flood light is right out here (indicating) and here is the front light here.

Q. And where are the lights on the turntable?

A. This is the turntable cabin here, and there is a light on this side of the turntable cabin, and the light on this end of the table—on both ends of the table—and a light here and a light there and a light in the center.

Q. Now you have stated the position of that large flood light?

A. Yes, sir.

Q. Is there any large flood light down in this section here (indicating)?

The Court: The witness is pointing out places on the map which mean nothing to the stenographer.

Q. I will have him mark on the map when he locates them. Won't you mark on the map the lights—at the turntable?

A. Yes, sir.

Q. Mark with an L so we will know it stands for lights?

A. Yes, sir.

Q. Make a good big letter.

A. There is one here and there is one here and this is where the flood light is right here and this is where the pole is right here and there were flood lights at the top.

Q. That is about, I suppose, the center of the roundhouse?

A. Yes, sir, about the center of the roundhouse.

Q. There was at the time a pole right here?

A. Yes.

[fol. 80] Q. Near track thirty-two?

A. Yes, sir, the pole was right here, see, and the pole stood out here in the center of the farm; and these stood right here in the center of the farm, but during a recent storm we had last summer we discontinued the lights.

Q. That was after the accident?

A. And they changed the pull from Weehawken.

Q. That was after accident?

A. Yes, sir.

Q. That the change was made?

A. Yes, sir.

Cross-examination by Mr. Carey:

Q. What would you say about the turntable main shed, that it was so lighted that it blinded you?

A. What I meant by that, when you come in front, you see the light was so strong that not being used to the lights it would kind of blind you for a second, going into the back end.

Plaintiff rests.

Motion for Nonsuit

Mr. Carey: If the Court please, I move for a nonsuit on the following grounds:

First. That at the time of receiving the injuries which resulted in his death plaintiff's intestate was not engaged in interstate commerce;

Second. No negligence has been established against the defendant;

Third. The negligence alleged in the complaint has not been established against the defendant. The negligence alleged in the complaint is that the engine was not in proper order; that no signal was given; that the brakes were out of order. None of those elements of negligence have been proven. On the contrary they have been disproven.

Fourth. At the time of receiving the injuries resulting [fol. 81] in the death of plaintiff's intestate he was not acting in the scope of his employment.

Fifth. The injuries which resulted in the death of plaintiff's intestate arose out of his negligence.

Sixth. The proximate cause of the death of plaintiff's intestate was his negligence.

Seventh. The injuries which resulted in the death of plaintiff's intestate were received at the place where his duties to defendant did not require him to go.

The Court: I will rule on your motion Monday morning.

(Recess until Monday morning, May 7, 1928.)

Monday Morning, May 7, 1928.

(The above entitled cause continued pursuant to adjournment.)

The Court (after hearing argument): The motion for nonsuit will be denied and an exception allowed.

Mr. Carey: The exception is noted?

The Court: Yes.

DEFENSE

CORNELIUS McGEE recalled.

Direct examination by Mr. Carey:

Q. Mr. McGee, did you see the body of this man after the accident happened?

A. Yes, sir.

Q. How soon after the accident happened did you see the body?

A. Why I should imagine about three minutes; just as soon as the man notified me.

[fol. 82] Q. You got off the engine, did you?

A. Yes, sir, just as soon as I put her in a safe position.

Q. And where did you go?

A. Right to the accident.

Q. Did you see the body?

A. Yes, sir.

Q. Where did you see the body?

A. I seen the body on the track number eight with the body on the outside of the rail toward number nine.

Q. Toward what?

A. The body toward number nine.

Q. On the right hand side?

A. Yes, sir.

Q. When you say the right hand side, in which direction were you looking?

A. Looking toward the back of the tank, toward the tank.

Q. What is it?

A. Toward the tank, outside.

Q. Which way were you facing?

A. I was facing outside the roundhouse.

Q. Which way was the engine facing?

A. Towards the front of the house.

Q. Won't you come down to the diagram here and show us what you mean by the right hand track or right hand rail of the track you were on?

A. Yes, sir.

Q. Do you see track eight (indicating diagram)?

A. Yes, sir.

Q. Which rail do you refer to when you say the right hand rail?

A. This rail right here.

Q. Will you put an X mark on that rail which you refer to?

A. Yes, sir (marking diagram with an X).

Q. Is that rail adjacent to track seven or track nine?

A. Track nine.

Q. Referring to this diagram of the engine on this map, where did you find the body?

A. Right there beside that. He has got two trucks on [fol. 83] this, but that has three trucks, laying right in here (indicating on diagram).

Q. Your mark, you just put in front of the second of the rear wheels on the tender?

A. Yes.

(Witness resumes the stand.)

Q. Were there any tools along the track there?

A. No, sir.

Q. Do you know what tools this man used?

A. Yes, sir.

Q. What did he use?

A. I seen them—I didn't see him, but I seen them carrying a pail and a box-packing outfit.

Q. Were there any tools of any kind along the track there at that time when you first saw the body?

A. No, sir.

Q. Did you see any blood marks?

A. I seen blood marks after the accident.

Q. After the accident?

A. Yes, sir.

Q. Where were the blood marks which you saw?

A. About thirty feet going into the house from the turntable.

Q. About thirty feet from the turntable?

A. Yes, sir.

Q. And the distance from the turntable to the door of the roundhouse being sixty-eight feet that would be about half way?

A. Yes, sir.

Q. Now where were those blood marks with reference to the right-hand rail which you have marked?

A. On the right-hand rail.

Q. And from that point did you trace the blood marks to a point which you have referred to?

A. Yes, sir.

Q. And how far did that extend?

A. To the turntable where the accident happened.

Q. At the place where you found the body?

A. Yes, sir.

[fol. 84] Q. What part of the body—was any part of the body outside of the right-hand rail?

A. Yes, sir, his shoulders were the only thing laying on the rail and all the rest of his body was outside towards track number nine.

Q. Did you see any marks along the outside of the right-hand rail of track eight?

A. Yes, sir, from where the accident started.

Mr. Simpson: I object to that and ask to have it stricken out.

The Court: Strike it out.

Q. Where, with reference to the blood spots that you saw?

A. About thirty feet.

Q. About thirty feet from the blood spots?

A. No, about thirty feet from the turntable.

Q. Now where did the dragging marks start with reference to where you saw the first of the blood marks?

Mr. Simpson: If the Court please I object to the form of the question—"dragging marks." There is no proof whatever that this witness knows what dragging marks are, and it is purely a conclusion. I don't object to him describing the marks so that the jury can say what the dragging marks are.

The Court: Reframe the question so as to use instead of the words "dragging marks" have it refer to the marks he previously testified to.

Q. Referring to the marks which you have previously testified to, where did those marks begin with reference to the first of the blood spots which you saw?

A. Right opposite.

[fol. 85] Cross-examination by Mr. Simpson:

Q. Do you now recall that the foreman told you not to take this engine out too early?

A. No, sir.

Mr. Carey: If the Court please, I object to that question; and I also move to strike out all the testimony with respect to the alleged conversation between the assistant foreman

Kelly and Mr. McGee with reference to the early taking out of the engine, on the ground that there is nothing in the complaint which calls upon us or which alleges negligence of that character, and counsel has already said that he relies upon negligence in failing to give warning.

Mr. Simpson: I submit it is too late to move to strike it out.

The Court: Motion denied.

Mr. Carey: Exception noted.

The Court: Certainly.

Q. You did have a conversation with the foreman about this one engine, didn't you?

A. Only about the whistle.

Q. Did you have a conversation about any other engine that you moved that night?

A. No, sir.

Q. Had you moved any other engine that night?

A. Yes.

Q. How many had you moved?

A. I won't say just how many, maybe four or five.

Q. Do you know the numbers of them?

A. No, sir.

Q. What time did you move the first engine?

A. I couldn't recall that.

Q. Did you go to the board to look what time this engine was supposed to leave before you moved this engine that [fol. 86] was in the accident?

A. No, sir.

Mr. Carey: Object to the question. It relates to no negligence which is alleged in the complaint, and it is immaterial.

The Court: Objection overruled.

Q. Did you go to this board?

Mr. Carey: I object to that, and ask that my objection be noted.

The Court: Yes.

Q. Did you go to this board in the roundhouse where it stated engine so and so is scheduled to leave at such and such a time? Did you go to that board in question?

Mr. Carey: I object to that question. That represents the time the engine crew was to take the engine out away from the roundhouse and not the time when the engine was to be moved out of the roundhouse by the hostler.

The Court: Objection overruled.

Mr. Carey: Objection noted.

The Court: Yes.

Q. Did you go to this board before you went to this engine that was in the accident?

A. No, sir.

Q. Then you didn't know what time was up on the board for that engine to leave?

A. I knew.

Q. How did you know it?

A. I have my orders before I go to work.

Q. Who do you get your orders from?

A. Mr. Kelly, right on a slip.

Q. Have you got that slip?

A. No, sir.

Q. Who has got the slip?

A. That slip is tore up.

[fol. 87] Q. What did that slip say as to time?

A. Give me the time it was due out, three o'clock.

Q. 3:18?

A. The crew was supposed to get on the engine at three o'clock.

Q. And the time you had on your slip was three o'clock?

A. The time I had was the time to be moved out of the roundhouse.

Q. Who gave you those slips?

A. Mr. Kelly.

Q. Who gave you that slip?

A. Mr. Kelly.

Q. What did it say?

A. The time the engine was to be moved.

Q. What did it say on your slip, 3, 4?

A. I suppose it said 2:30.

Q. What?

A. About 2:30 I suppose.

Q. You know perfectly well it said 3 o'clock because you have already sworn that the time the engine was due to leave was three o'clock.

The Court: He said the time the crew was to leave.

Q. If you don't know say so.

A. (No answer.)

Q. You are guessing now about the time, aren't you?

A. No, sir.

Q. Did you go to the board to look if it was 2:30 on the board?

A. No, sir.

Q. Where is this board?

A. In the middle of the roundhouse.

Q. Who has got that slip that was given to you?

A. Nobody.

Q. What did you do with it?

A. When I do my work I throw the slip away.

Q. You threw it away?

A. Yes, sir.

Q. And you didn't say anything about when you were called here about having a slip the last time the case was on, about having a slip with 2:30 on it.

A. Not that I know of; I wasn't asked.

[fol. 88] Q. Who have you talked to since you were here last?

A. All the men that have been there.

Q. The foreman?

A. Yes, sir.

Q. The claim agent?

A. No, sir.

Q. You got on this engine at what time?

A. I got on the engine about 2:20.

Q. Were you a green hostler or experienced?

A. Experienced hostler.

Q. How long have you been a hostler?

A. Off and on.

Q. Off and on?

A. Yes, sir.

Q. What time did you give the time to the turntable man, the three blows of the whistle for the turntable?

A. 2:30.

Q. 2:30, just as soon as you got on the engine you gave him the three blows. Did you get the turntable then?

A. No, sir.

Q. How long did you have to wait before you got the turntable?

A. Ten minutes.

Q. Did you say to the foreman that the turntable man must have been asleep?

A. Yes, sir, something like that.

Q. Something like that?

A. Because he had to give the whistle—when they give a whistle they generally have a table——

Q. But you gave the whistle then just as soon as you got on the engine?

A. I didn't give it as soon as I got on the engine.

Q. You have already sworn that you got on the engine at 2:20 and you gave the two blows at 2:30. So you gave the blows as soon as you got on the engine.

Mr. Carey: I object to that.

The Court: Objection sustained.

Q. You gave the three blows at 2:30?

A. Yes, sir.

[fol. 89] Q. And you didn't get the turntable?

A. No, sir.

Q. And you said to the foreman, "He must have been asleep." Where was the foreman?

A. The foreman I mean on the floor.

Q. What?

A. The foreman on the floor. He was saying something. I couldn't understand what he was saying—arguing to me.

Q. What was he arguing to you about?

A. "Don't blow the whistle so loud."

Q. Did he say anything about not moving too early?

A. I don't remember that.

Q. Was that when you gave the first three blows?

A. That was when I gave the first three blows, just before he came in.

Q. And that is when he said, "Don't blow so loud"?

A. Yes, sir.

Q. And that is when you said, "The turntable man must have been asleep."

A. Yes, sir.

Q. When you gave the first three blows you had to wait ten minutes?

A. Yes, sir.

Q. When you got the turntable the second time what did you do?

A. Moved out.

Q. How did you know you had the turntable?

A. I could see out there and I seen his signal.

Q. Whose signal could you see?

A. The turntable man's.

Q. How do you know you didn't get the turntable's signal? Did you get any signal?

A. Not the first time.

Q. What was the overhang of your engine towards the tank?

A. The overhang you mean——

Q. What was the furthest point of the truck—the overhang of your tank on the track toward the engine on the next track?

Mr. Carey: I object to that, if the Court please. It is [fol. 90] evident that this injury was caused by the striking of the tank, not the engine—or the tender rather.

Mr. Simpson: This is cross examination, and the purpose of the objection is evidently to hamper the cross examination. I have a perfect right to know what was the overhang of the engine.

The Court: Objection overruled.

Mr Carey: Objection noted.

The Court: Yes.

Q. What was the overhang of your tank, how much did you go over your track?

A. I don't know that.

Q. You don't know what clearance there was between your tank and the tank of the engine on track seven?

A. About two foot.

Q. Now then, a man oiling the boxes, the axles, the axle boxes nearest to your engine on track seven would have to stand in that two feet, wouldn't he?

A. Yes, sir.

Q. To do his work oiling and packing those boxes there where these boxes were down on the wheels.

A. Yes, sir.

Q. So that to properly oil them he might of necessity have to stoop?

A. No, sir.

Q. How could he do it?

A. Just bend over the least little bit.

Q. Just come down and show us how the men that packed the axle boxes without as you said stooping. Show us how he would do it.

A. The box was about that high (witness leaves stand and illustrates).

Q. As high as the wheel?

A. Yes.

Q. Now just show us.

A. So he would have to pull up the box there and jab in there (witness illustrates).

[fol. 91] Q. Just stand like you would.

A. Yes.

Q. And that would bring you how? Just stoop as much as you would have to.

A. The way I am now (illustrating).

Q. That would bring you that much toward the engine?

A. Yes, sir.

(Witness resumes stand.)

Q. Did you know whether anybody was working on this engine on track seven the last engine that this man worked on before he was killed?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Had you been instructed by the foreman of the roundhouse or by the assistant, the superior of this dead man that there was anybody working on the engine on track seven?

A. No, sir.

Q. And you didn't know whether there was or was not?

A. I looked.

Q. Where did you look?

A. I looked on the left-hand side of 3709 towards track seven.

Q. From your engine?

A. Yes, sir.

Q. And if he had been behind the engine on track seven or on the other side you could not have seen him?

A. I could have seen him when I come in.

Q. You couldn't have seen him from where you are describing the observation you are making now?

A. No, sir.

Q. So the observation you made of the engine alongside of it wouldn't reveal this dead man if he was behind there or on the other side of it?

A. No, sir.

Q. When you first knew you killed a man what did you do?

A. I jumped right down and seen what happened to him.

[fol. 92] Q. Where were you when you first knew it?

A. When I first knew it I was up in the cab.

Q. How much of your engine was out of the roundhouse?

A. All my engine.

Q. It had gotten clean out?

A. Yes, sir.

Q. How much of it was on the turntable?

A. About three foot.

Q. And all the rest was pointing towards the roundhouse?

A. Yes, sir.

Q. Had the body been taken out when you saw it?

A. No, sir.

Q. It was still under the engine?

A. Yes, sir.

Q. Did you see Bechtol there?

A. No, sir, Bechtol—Otto?

Q. Yes.

A. No, I didn't see him there at that time.

Q. Who told you there was an accident?

A. Mr. Maloy, the turntable man.

Q. You didn't see the man who has described that he saw a blue shirt and pulled the body out?

A. No.

Q. You didn't see him there at all?

A. No, sir.

Q. Who took the body out from under the engine?

A. Mr. Bechtol.

Q. That is the man I am talking about.

A. I seen him after the accident happened.

Q. You didn't see him when he took the body out?

A. Yes, sir.

Q. You have said no and you have said yes. Did you see him?

A. I seen him when he rolled out from underneath the tank.

Q. You saw him when he rolled out from underneath the tank?

A. Yes.

Q. Is that right?

A. Yes.

Q. Was the body still under the tank when you first saw it?

A. Yes, sir.

[fol. 93] Q. Where was the head?

A. I don't know where the head was. His shoulders was only on the rail when I seen him.

Q. Did you see the head?

A. No, sir.

Q. What part of the body did you see?

A. The back and hind quarters and legs.

Q. Where were they?

A. Outside of track number eight.

Q. That is on the right hand rail?

A. Right hand side.

Q. And you didn't see the head?

A. No, sir.

Q. What did Bechtol roll if the body was already out when he saw it? What did he roll out?

A. The shoulders were laying on the rail just like that, and the head, if he had one, was towards the back of the tank.

Q. And you spoke of blood stains. When did you look for blood stains?

A. After the accident happened.

Q. How long after the accident happened?

A. Oh, just as soon as the hospital authorities were notified.

Q. What did you do to look for bloodstains?

A. I just wanted to see where the man was hit.

Q. What did you do?

A. I didn't do nothing.

Q. What?

A. I just stood there.
Q. Didn't you look for the blood stains?
A. Yes.
Q. If you just stood there how could you look for blood stains?
A. They were right on the rail where the accident happened.
Q. What you call where the accident happened is where the body was taken out?
A. No, sir, where the body was first hit.
Q. How can you say where it was first hit?
A. I can't say only relying on the blood stains.
[fol. 94] Q. You don't know where the man was hit, where he was when he was first hit?

The Court: He said he can't tell.

Q. All you know——
A. I saw blood stains.
Q. Did you go in the roundhouse and look for blood stains?
A. No, sir.
Q. You never made an examination there?
A. No, sir.
Q. Did you see his hat?
A. No, sir.
Q. You don't know where his hat was knocked off?
A. No, sir.
Q. Where is this board kept where they mark up the time of the engines?
A. In the middle of the roundhouse.
Q. What kind of a board is it?
A. Blackboard.
Q. Who does the marking?
A. The foreman of the roundhouse.
Q. Night foremen or day foremen?
A. I couldn't tell you which one.
Q. After the accident happened what did you do with this engine?
A. I let it stand there.
Q. When did the crew take it?
A. The crew took it after three o'clock.
Q. Did they take it from the position you left it in?

A. No, sir, the other hostler moved it.
Q. What is his name?
A. Klink.
Q. If you were not in the accident would you have moved it to where the crew would have taken it?
A. Yes, sir.
Q. Where was that?
A. Outside the master mechanic's office.
Q. About how far from where the body was found?
A. Three hundred yards.
Q. Take you how long to do it?
A. I should imagine about five or seven minutes.
[fol. 95] Q. Five or seven minutes to go three hundred yards?
A. From the turntable.
Q. Five to seven minutes?
A. Yes, sir.
Q. Did you take any other engine out after this one?
A. No, sir.
Q. This was the last one you took out, was it?
A. Yes, sir.
Q. You never made any examination then of the point where you first started to move this engine immediately after the accident, did you?
A. No, sir.

Redirect examination by Mr. Carey:

Q. Did you ever measure the clearance between the engine tanks or engines on these tracks?
A. No, sir.
Q. You don't know from having measured them?
A. No, sir, I never measured them.
Q. Why do you say two feet, then?
A. Well, I figure two feet because I can squeeze through myself between the door and the engine.
Q. You mean the door post?
A. The door post and the engine.
Q. The door post and the engine?
A. Yes, sir.
Q. How wide is the door post?
A. There are two posts with a door on each post.
Q. Then at the rear of each track there are two posts?

A. Yes, sir.

Q. And the doors swing on hinges attached to these posts?

A. Yes, sir.

Q. And a door for track eight would be hung to a post on this side and the door to track nine would be on the other side?

A. Yes, sir.

Q. When you came in you walked all along the left side of the engine, did you not?

A. Yes, sir.

[fol. 96] Q. And whom did you see working on 3835?

A. Nobody.

Q. Didn't you look for anybody there?

A. Yes, sir.

Q. Did you look for anybody working on track nine?

A. Yes, sir.

Q. Did you see anybody working there?

A. No, sir.

Q. Did you see anybody from the time you boarded the engine until after the accident working on any engine or on track nine?

A. No, sir.

Recross-examination by Mr. Simpson:

Q. You made a written statement about this accident, didn't you?

A. Only to the claim agent.

Q. You made it and signed it, didn't you?

A. Yes, sir.

Q. Have you seen it since you made it?

A. No, sir.

Q. Have you read it since you made it?

A. No, sir.

Mr. Simpson: Have you got that, Mr. Carey?

Mr. Carey: Yes, sir.

Mr. Simpson: Will you produce it?

Mr. Carey (looking through papers): Do you want to put it in evidence?

Mr. Simpson: If you want to put it in evidence you can, but I want to use it in my examination of this man.

(Mr. Carey produces the paper called for.)

Q. Have you signed this paper?

A. Yes, sir.

Q. You say in this statement that you got there at two o'clock in the morning. Is that right? Instead of 2:30?

A. No, sir.

[fol. 97] Q. You didn't get there at 2 o'clock in the morning?

A. (No answer.)

Q. You made this statement right after the accident, did you not?

A. No, sir.

Q. When did you make it?

A. The next night at twelve o'clock—eleven o'clock rather—twelve o'clock—sometime.

Q. Which was it, the west side of your engine that you walked along? Is that the left-hand or right-hand side?

A. Left-hand side.

Q. Left-hand side. Did you say here—you don't say here anything in this statement, do you, about looking for people working around the engines?

Mr. Carey: I object to that question.

The Court: Objection sustained.

Q. You don't say anything in this statement about blood stains, do you?

A. I don't know.

Mr. Carey: I object.

The Court: Objection sustained.

ROBERT H. SIDDELL, recalled for the defendant.

Direct examination by Mr. Carey:

Q. Mr. Siddell, when you came back from the farm, as you called it, to what point did you go?

A. Went to the inspection wagon.

Q. And the inspection wagon was standing where?

A. Between stalls seven and eight.

Q. Front or rear?

A. Front always.

Q. And where were you at the time you learned that this accident had happened?

A. Just opened my desk and started to write my reports.

Q. The what?

A. At the inspection wagon.

[fol. 98] Q. At the inspection wagon. And you were writing what?

A. Making out my night's reports.

Q. What did you do after you learned that this accident had happened?

A. Closed my books, took my torch and went to see if his work was done.

Q. On what engine?

A. 3835.

Q. That is the engine where you left him working?

A. Yes, sir.

Q. What did you find with respect to his work?

A. It was all done complete.

Q. Did you look for his tools?

A. Yes, sir.

Q. Where were his tools carried?

A. In their place on the inspection wagon.

Q. And when did you find those tools there?

A. Immediately I got out of the pit after examining his work.

Q. Were all his tools there?

A. Yes, sir.

Q. Did you go to the place where his body was?

A. Yes, I walked out to the turntable.

Q. What was the position of the body when you arrived there?

A. They had it covered with a bag. It was covered.

Q. It had been taken out from under the tank?

A. Oh, yes.

Q. When you arrived there did you find any tools belonging to Marcone along the track there anywhere?

A. No, sir.

Q. Did you look?

A. I had to look; I had to walk up and down that track.

Q. Did you look for any bloodstains?

A. When daylight came.

Q. This was about three o'clock in the morning in July.

A. July.

Q. When you looked for bloodstains what did you find? [fol. 99] A. The first stains that I saw were on the right-hand rail and as near as I can remember they seemed to be about around 15 or 18 feet from the end of the roundhouse, as near as I can remember.

Q. And where else did you see bloodstains?

A. I didn't follow it up. It was in the morning when I went there and looked—it was with the general foreman. We walked together and looked, and near as I can remember it was about 18 feet where I saw the first part.

Q. And were there bloodstains along the rails anywhere else?

A. I didn't follow it back.

Q. You didn't follow it back?

A. No.

Q. Did you notice any marks along the rail?

A. There was marks on the outside of the ties, like dragging your foot or something like that.

Mr. Simpson: I object to that and ask to have it stricken out.

The Court: Strike out after there were marks on the outside of the ties.

Q. You saw marks there?

A. Yes, there were marks there.

Q. How far did those marks extend?

A. Only a short—about three feet.

Q. And where were the marks with reference to the turntable?

A. Up towards the roundhouse.

Q. Where were they with reference to the place where you saw bloodstains?

A. Three or four feet, maybe five feet from them towards the turntable.

Q. Had this man anything to do on track nine at this time?

A. No, sir.

Q. Had he anything to do on track nine between the [fol. 100] time you left to go out on the farm and the time when you came back and saw the bloodstains?

A. No, sir.

Q. Did you see anything of a cap along the track there?

A. Yes, sir.

Q. Where was that?

A. The cap was towards the turntable, maybe six feet—five or six feet from where I saw the mark.

Q. And where was that lying?

A. On the inside of the right hand rail between the rails.

Q. About what time was it, as near as you can recollect, when you came back from the farm?

A. I should imagine it was about 2:35 or 2:40.

Q. That is as near as you can state it?

A. Yes, sir.

Q. How long after that was it before you saw the body?

A. Maybe five minutes. I had just got started to write when they notified me.

Q. How long had this man been working for you?

A. I can't recall exactly, but I think it was about a year or maybe more.

Q. This same kind of work?

A. Yes, sir.

Q. Same place, throughout the roundhouse?

A. Yes, sir.

Q. You get your orders for working on engines from whom?

A. Mr. Kelly and Mr. Shusler, the other foreman. There are two of them.

Q. In what form does it come?

A. Mostly in verbal, although when we come to work at night we make out a little slip for each one of the engines.

Q. Who makes out the slips?

A. I make my own out of all engines that have not been done.

Q. Does anyone else give directions to your gang except yourself?

A. No, not after we start to work. I handle that.

Q. You handle it entirely?

A. Yes, sir.

[fol. 101] Q. Do you give them directions which engines to work on?

A. Yes, sir.

Q. If I recall your testimony correctly you say he had worked on fourteen engines at that time?

A. Yes.

Q. Beginning at seven o'clock?

A. Seven o'clock in the evening.

Q. And the eight hours end at what time?
A. 3 A. M.
Q. And in that time you have an intermission for supper?
A. Twenty minutes—11 to 11:20.
Q. Had you given this decedent Marcone any instructions as to work when you were leaving for the farm with the exception that he was to wait there at engine 3835?

Mr. Simpson: I object to that, first because it is leading and second there isn't any such testimony. His testimony is that he gave him instructions to wait there, not at engine 3835.

Q. What were your instructions?
A. To finish 3835 and wait for me. The inspection wagon was there. That is his place.
Q. The place for waiting is where?
A. At the inspection wagon.

Mr. Simpson: I object as calling for a conclusion, the place of waiting.
The Court: Objection overruled.
Mr. Simpson. I ask for an exception.
The Court: You may have it.

Q. And at that time the inspection wagon was where?
A. Between stalls seven and eight.
Q. And at what position?
A. Out in the big wide concrete runway.
[fol. 102] Q. How wide is that concrete runway?
A. Ten feet.
Q. Front or rear?
A. Front, up against the wall.

Cross-examination by Mr. Simpson:

Q. You saw the body at half past two?
A. No, sir, it was later than that when I saw it.
Q. Didn't you testify that you came back there at 2:35 or 2:40 and five minutes before you saw the body?
A. No, sir, I did not.
Q. What time did you see the body?
A. Five minutes after I arrived at the wagon.
Q. What time did you arrive at the wagon?
A. I presume about 2:35.

Q. Where was the wagon?
A. In between tracks seven and eight.
Q. And did you go to the wagon before you saw the body?
A. Certainly.
Q. Not certainly. Did you go?
A. Yes, sir.
Q. Before you saw the body?
A. Yes, sir.
Q. Did you look at your watch to see what time it was?
A. I did not, no.
Q. Did you know there had been an accident?
A. No.
Q. You didn't know anything when you got to the wagon about an accident?
A. No, sir.
Q. Why did you go to the wagon?
A. That is where we congregate to do our work, to finish it.
Q. To do what?
A. To finish our work.
Q. When you got to the wagon was this engine out of the roundhouse or in the roundhouse?
A. Which one do you mean?
Q. The one that killed the man?
A. She was out.
Q. And you got to the wagon about 2:35?
A. 2:35 or 2:40, I couldn't swear on it.
[fol. 103] Q. Do you know how long she had been out when you got to the wagon?
A. She was in when I left.
Q. When you left to go out to the farm—when did you leave to go out to the farm?
A. About 2:15.
Q. And the engine was there?
A. Yes, sir.
Q. When you came back at 2:35 or 2:40 she was out?
A. Yes, sir.
Q. Did you see her?
A. Seen her headlights shining.
Q. Was she in motion or stopped?
A. Standing still.
Q. And this engine you speak of as 3835——

Mr. Simpson: It is admitted, your Honor, that this engine 3835 pulls a train into New York State.

Q. What time did you put this man to work on 3835?
A. About 2:15.
Q. What did he have to do?
A. Packed the engine, re-doped the engine trucks, re-oil the trailers.
Q. How many?
A. One on each side.
Q. How many tank boxes?
A. Six on each side.
Q. What else did he have to do?
A. Re-dope the engine trucks.
Q. What does that mean?
A. The engine trucks on those engines,—is a pony truck, only two wheels—not a double truck. He has to take the cellars out, re-dope them, put new dope in composed of wool waste and oil—change the dope on those.
Q. Then he had to do oiling, re-dope these things and pack the grease box, you say?
A. No. The driving wheel——
Q. I want to know what he had to do at 2:15?
A. He started to re-dope the engine truck cellars.
[fol. 104] Q. Now what was the doping operation?
A. Take the cellars out.
Q. What is a cellar?
A. The cellar is a kind of vessel, as you might call it, that holds the dope.
Q. Then what did he have to do?
A. Take out the old dope, put it in one bucket and replace it with new oily dope.
Q. And then put that back in?
A. Yes.
Q. Where was that with reference to the engine, down in front or up near the tank?
A. Down in front at the first pair of wheels.
Q. What did he have to do at the rear where the tank was?
A. He didn't have nothing to do there.
Q. I mean, did he have to put in these boxes on the wheels—did he have to put packing in them?
A. Just only when they are burned out.

Q. What did he have to do to oil these at the end? Just come down here.

(Witness leaves stand and goes to the diagram.)

Q. He was in front of the two wheels, of these two wheels, and behind these two wheels on this tank. What did he have to do on these four wheels?

A. That isn't correct.

Q. That is the picture they gave us.

A. The tank boxes are here. These journals have got to have oil, and he has got to open that little tank box and open the journal and put in oil.

Q. How can he tell it needs oil? Does he have to feel with his fingers?

A. No, sees with a light.

Q. With a light?

A. With a light.

Q. Then when you came back at 2:35 that was all finished?

A. All, yes.

Q. And you didn't see him around at all?

A. No.

[fol. 105] Q. He was then of course killed under the engine?

A. Yes.

Q. Now, speaking of tools here, what tools do you mean?

A. The box packer has his own kit of tools.

Q. What does it consist of?

A. It consist of a packing iron. I would have to draw it. It is a bell iron like this, see? It has a hook on that so he can easily open the cellars.

The Court: They are the same things you see men at stations going along opening the top boxes over the wheels with?

The Witness: Yes.

Q. You don't go around looking over the engine to tell them what to do? He was supposed to know what to do.

A. I go with him when I have got a new man, but that man was an experienced man.

Q. How long had he been working for you?

A. Over a year.

Q. A good workman?

A. Yes, sir.

Q. And he had been there for a year?

A. I couldn't tell you just how long, but I had had him a long while, quite a while.

Q. You say this work was all done on 3835 when you examined her?

A. When I noticed I immediately took my light and looked.

Q. That is immediately after the accident?

A. No, after they notified me.

Q. About what time was that?

A. I got back at 2:35 or 2:40. It was probably three or four minutes. I had just got back when I seen the other foreman looking toward me up at the turntable.

Q. This truck you went to, was that in the same position [fol. 106] at the head of the engine? You spoke of going to a truck or wagon. Where was that located?

A. The inspection wagon?

Q. Yes, where you went after the accident.

A. Between stall seven and eight.

Q. What part between stalls seven and eight?

A. Out to the front, past the end of the rails there is a wide concrete space there.

Q. And at 2:15 you told him to fix this engine and wait for you, is that right?

A. Yes.

Q. In their work these men pass all over the roundhouse, don't they, these packers have to walk all over the roundhouse?

A. The gang stays together. We move from engine to engine.

Q. How many would there be in a gang?

A. He was working with me.

Q. You were away.

A. I left him behind to finish that engine. He was late arriving at that engine. I had finished the inspection of the engine. We had finished the grease cups, the lubricating, the sand, and was just completing making out my report; and when he arrived I said, "Go ahead, Joe."

Q. So Joe arrived late at 3835?

A. Yes.

Q. And it was then you gave him his instructions to go on 3835 and you went on with your work?

A. Yes, sir.

Q. And if this accident hadn't happened he was through, wasn't he? Did he have anything else to do, or did he have to wait for you to tell him?

A. He had nothing else to do.

Q. And if you had come back there and you had found him at the truck at 2:35 what would you have done with him? I mean if this accident hadn't happened he had finished 3835?

A. We would have gotten our tools all together and moved our wagon to its standard place at number 2 and we would have made out our cards and gone home.

[fol. 107] JAMES H. KELLY, recalled for the defendant.

Direct examination by Mr. Carey:

Q. Mr. Kelly, you were at track one when you heard the whistle, as I recall your testimony?

A. Yes, sir.

Q. And you went from there to track eight?

A. Yes, sir.

Q. How did you go there?

A. Around this concrete walk in the roundhouse.

Q. In front of the engines?

A. Yes, sir.

Q. The hostler has testified that he moved the engine out of the roundhouse about 2:30. Could you say whether that was too early or otherwise?

Mr. Simpson: I object to that, if the Court please, his opinion as to whether it was too early.

The Court: Objection sustained.

Mr. Carey: If the Court please, he is the assistant foreman of the roundhouse.

The Court: Yes.

Mr. Carey: And he is the one from whom these hostlers take their instructions.

The Court: Objection sustained.

Mr. Carey: Objection noted?

The Court: Yes.

Q. If an engine was to be taken, or if the time schedule for the train crew to take an engine was three o'clock will you state whether or not moving the engine out of the roundhouse at 2:30 would be too early?

A. No, sir.

Mr. Simpson: I object to that—same objection. That calls for this man's opinion.

[fol. 108] The Court: Yes. I think what is customary governs, Mr. Carey, rather than this man's opinion. Objection sustained.

Mr. Carey: Objection noted?

The Court: Yes.

Q. Are you familiar with the custom as to the time of moving engines out of the roundhouse with reference to the time when the engine crew takes them?

A. Yes, sir, that is my business.

Q. Now will you tell whether in accordance with that custom the moving of the engine from the roundhouse—backing the engine from the roundhouse a half hour before the time it was scheduled to move would be proper, or not proper, but in accordance with the custom?

A. There is no such time as long as the engine is there by three o'clock. If she is there after three o'clock she is late leaving the roundhouse and against my records.

Q. What was the customary time between the time of backing the engine out of the roundhouse and the taking of the engine by the engine crew?

A. No set time.

Q. I understand there is no set time, but what was the customary time?

A. Well, I gave them a chart, a paper, and I make the charts half an hour, so they can take it out fifteen minutes or so before. Before the crew reached the engine it had to be at the water plug at that time.

Q. A half hour would or would not accord with the custom?

A. Half an hour would be all right; an hour would be all right.

Cross-examination by Mr. Simpson:

Q. So that if a man was working on the engine and the board in the roundhouse said three o'clock was the leaving

[fol. 109] time, it would be perfectly all right, without warning, to move the engine right over him half an hour before the time.

Mr. Carey: Objection.
The Court: Objection sustained.
Mr. Simpson: I ask for an exception.
The Court: Yes.

Q. You said to this man, "Don't move this engine too early." What time did you say that to him?
A. What I meant by that was——
Q. I don't care what you meant. What time did you say it to him?
A. At the time he was in the cab of 3709.
Q. What time?
A. That I don't know; I left the office a quarter to two to go through the roundhouse.
Q. How far is your office from the roundhouse?
A. I don't know; I never measured it.
Q. How long did it take you to walk from your office to the roundhouse?
A. Sometimes half an hour; maybe I stop fifteen or twenty times.
Q. I am not asking you for a history of your life. I am asking you how long it took you that night to walk from the office to the roundhouse?
A. From what point?
Q. From your office?
A. To the roudnhouse?
Q. Yes.
A. About a minute from the office to the roundhouse.
Q. So you left your office at what time?
A. About a quarter to two.
Q. Quarter of two?
A. Yes, sir.
Q. You were in the roundhouse then fourteen minutes of two?
A. I was.
Q. And how long were you in the roundhouse before you said to this man, "Don't move this engine too early?"
[fol. 110] A. Well, I had walked down the entire length of the roundhouse; I don't just know how long I was in

there. I walked from 32 stall to number 1 stall around the concrete walk.

Q. Have you any objection to telling me how long you were in the roundhouse, it being now established that you got there fourteen minutes of two,—how long you were in the roundhouse before you w at to this man and said, "Don't move your engine too early?"

A. I didn't time myself; I don't know.

Q How long had you been in the roundhouse before you went to him and said, "Don't move your engine too early?"

A. Well, I may have been in the roundhouse twenty or twenty-five minutes.

Q. All right. Let's give you twenty-five minutes. That would have been ten minutes after two.

A. Yes.

Q. So ten minutes after two you said to him, "Don't move the engine too early?" And you found him on the engine, although he said he didn't get on the engine until 2:30.

Mr. Carey: I object to that.

The Court: Objection sustained. He said 2:20.

Q. What time——

A. I went down and asked him why he was blowing his whistle so loud. I said, "Do you want to get us locked up for blowing that too loud?" I said, "Don't take the engines out too early unnecessarily"; and McGee said, "I am blowing for the turntable"; and he said, "He knows I want the turntable; I told him."

Q. And that was all you said to him?

A. That was all I said to him.

Q. And then you went away?

A. Yes.

[fol. 111] Q. Why did you say, "Don't take the engine out too early"?

A. Because sometimes they have; they take the engines outside to a plug.

Q. You have described how you told him, "Don't move the engine too early."

A. I didn't say that engine,—"Don't take the engines out too early."

Q. Well, he was on this engine that killed the man?

A. Yes, sir.

Q. And you said to him, "Don't take the engines out too early?"

A. Yes.

Q. What did you do then?

A. I left, I walked away from him.

Q. Did you still stay in the roundhouse?

A. Stay in the roundhouse?

Q. Did you then stay in the roundhouse?

A. Yes.

Q. Did you hear the second three blasts?

A. I heard the second three blasts.

Q. How long after you had told him, "Don't take the engines out too early" did you hear the second three blasts?

A. It might have been five, eight, or ten minutes; I don't remember.

Q. Either five, eight or ten. Then what did you do, anything?

A. I seen the engine move out; I turned around, the whistle blew; the foreman said to me, "He didn't pay much attention to you about blowing that whistle." And I said, "I'll see him later." And the next I heard was the turntable man——

Q. Where was this board on which the time of leaving was posted? In what part of the roundhouse?

A. I didn't write them. I said the general foreman, day. Sometimes I might have.

Q. The day foreman wrote them on?

A. Before he went home.

Q. What time did he go home?

A. Six or seven.

Q. This Mr. McGee says something about getting a slip [fol. 112] on which the time was stated that he was called to take the engine out. Did he get any slip from you?

A. Yes, sir, he did; that is my testimony; every night the starting time.

Q. Have you got a copy of that starting slip?

A. No, sir, I have not.

Q. He don't give it back to you?

A. No, he can do what he likes with it.

Redirect examination by Mr. Carey:

Q. For whose information are these numbers put on the blackboard?

A. Put on there for the roundhouse employees in general, so they can all go up to the board and see what time the engine is due out and they know what they have got to do. That gives them a line-up for their work for the evening.

Q. These men are given directions with respect to the engine they are to work on by their foreman?

A. Yes, sir.

Q. And the time they are to work on them?

A. No, they know themselves by following this board, and then when the engine is O. K. the hostler is told, "O. K., take her out."

Q. None of these men go to work on an engine until the foreman tells them to do that, do they?

A. The foreman may hand them a slip on two or three engines and say, "I want you to work on such and such an engine first."

Recross-examination by Mr. Simpson:

Q. The hostlers have a certain amount of work to do and as soon as they do that they are through, isn't that so?

A. Sir?

Q. The hostler has a certain amount of work to do and as [fol. 113] soon as he gets through his work he is through, isn't he?

A. He can't leave the roundhouse until leaving time.

Q. If he finishes all of his work before leaving time can he sleep in the roundhouse?

A. No, he is not supposed to sleep in the roundhouse?

Q. What does he do after he finishes everything he has got to do before he gets out?

A. He generally comes in the office where I am or where the engine dispatcher is.

Jerome Gordon, recalled for the defendant.

Direct examination by Mr. Carey:

Q. Mr. Gordon, can you tell us what the clearance is between tanks standing on track eight and track nine in this engine house?

A. About three feet nine and a half inches.

Q. About three feet nine and a half inches?
A. Yes, sir.
Q. And between tracks seven and eight?
A. It is the same.
Q. Same thing, same distance all around the tracks?
A. No, it depends upon the width of the tender.
Q. Tenders of engines 3709 and 3835, are distances which you have given us of clearance?
A. Yes, sir.
Q. And you say that is three feet nine and one-half inches?
A. Yes, sir.

By the Court:

Q. Where is that?
A. That is within the door.
Q. That is at the door?
A. Fourteen foot clearance.
Q. Is this three feet nine and one-half inches you have [fol. 114] spoken about as being the clearance between these two tanks——
A. That would be inside the door.
Q. Just inside the door?
A. Yes, sir.
Q. The tracks narrow from the turntable—no, widen from the turntable to the center of the roundhouse?
A. Yes, sir; this is immediately inside the door.

Cross-examination by Mr. Simpson:

Q. Do you know the distance of clearance between engine 3835, being on track seven, and the other engine that killed the man on track eight? Can you tell what was the nearest distance between the tanks as they stood on the tracks?
A. At the time of the accident?
Q. These two engines stood one on track eight and one on track seven. I am trying to find out what was the clearance supposing this man was working between these two tanks?
A. Three feet nine and one-half inches.
Q. And that would be at the point where the engines were standing?
A. Not at the time of the accident.

The Court: That is at the door.

Q. That would be more or less at the place of the accident?

A. It would be more, probably.

Q. The farther inside the roundhouse you go the distance increases, is that it?

A. Yes, sir.

Defendant Rests.

MOTION FOR DIRECTED VERDICT

Mr. Carey: I move for a direction of a verdict on all grounds stated in my motion for a nonsuit.

(Motion denied.)

[fol. 115] Mr. Carey: Exception.

The Court: That map has not been put in evidence. I presume it should be marked in evidence.

(The diagram was marked Exhibit D-1 in evidence.)

(Both sides sum up to the jury.)

CHARGE TO JURY

The Court thereupon charged the jury as follows:

The Court: Gentlemen of the Jury: This is an action brought by Donoto Marcone, as administrator of the estate of Joseph Marcone, deceased, against the New York Central Railroad Company. It is brought for the purpose of recovering damages under what we know as the Death Act, for the death of Joseph Marcone, which it is alleged was caused by the negligence of the defendant company. The action is brought under what we commonly in law speak of as the Federal Employers' Liability Act.

Now, gentlemen, the plaintiff claims that on the 27th day of July, 1926, the deceased was working at the roundhouse of the defendant company at New Durham, in this county; that he was there engaged in interstate commerce; that the defendant was then and there engaged in interstate commerce and that through the negligence of the defendant he

was killed and the administrator brings this suit to recover damages for his death. The defendant company says that it is true that it was engaged in interstate commerce but that the deceased at the time in question was not engaged [fol. 116] in interstate commerce and that his death resulted from his own negligence.

Now, gentlemen, it is important that I read to you a section of the Federal Employers' Liability Act under which this case is brought. That act provides that every common carrier by railroad while engaging in commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. And the act further provides that in all actions hereafter brought against such common carrier railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

You will notice that a prerequisite to a suit under this statute is that both the defendant and the deceased in this case were engaged in interstate commerce at the time of the accident. The defendant admits that it was engaged in such commerce but denies that the deceased was. Therefore the first question for you to determine is whether or not Joseph Marcone at the time in question was engaged in interstate commerce; and you must determine from all [fol. 117] the facts and all the circumstances in the case at the time of the happening in question. Was the intestate engaged in and about a duty which he owed to his master, the defendant company, with respect to interstate commerce, or had he removed himself from that employment? Had he taken himself out of that relationship that had existed as between himself and the defendant company so that he was not at the time of the happening in

question engaged in any act which he was called upon as the servant of the defendant company to perform in relation to and with respect to the interstate commerce of the defendant company? You will ask yourselves: Where was this man killed, in the roundhouse, or outside of the roundhouse? What was he doing at the place he was when killed? Did his work call for him to be there? Was he doing something disassociated from his work in connection with the engines at the time he was killed? Did he go from a place of safety to a place of danger, not being ordered there by his superior and not in furtherance of his duties?

It is only when you find from the evidence and under the rules I have given you that at the time of the happening the defendant company was engaged in interstate commerce, which, as I have said, they have admitted, and that the intestate of this plaintiff was likewise engaged in interstate commerce, that he has a right of action under this statute. If that has not been shown to you by a preponderance of the evidence on the part of the plaintiff, then you need not go any further with your deliberations, because then the case must end and your verdict must be for the defendant.

Now, if you should pass that point you will have observed from what I have read from the statute that the [fol. 118] basis of an action of this kind is founded upon negligence, and that logically brings us to consider what the negligence is which the plaintiff in this case claims this defendant was guilty of, and that is the charge as contained in the written complaint. The plaintiff in his complaint says that the negligence of the defendant consisted in this: "That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; that it did not use reasonable care to equip said locomotive with suitable headlights or any headlights or any lights and did not use reasonable care to propel same at a safe rate of speed." Now the plaintiff relies on that part of the complaint which charges that the defendant did not give warning

of the movement of this locomotive. It is a fundamental principle in the law that the plaintiff is bound to satisfy the jury by a fair preponderance of the evidence that the defendant was guilty of negligence and that that negligence of which he was guilty, if he was guilty, proximately caused the accident of which he complains and for which in this suit the plaintiff seeks a recovery.

Now, gentlemen, let me say to you, that the mere happening of an accident, unfortunate though it is, standing alone, of itself does not entitle the plaintiff to a recovery against a defendant. The law is, as I have said, that the plaintiff must prove his case by a fair preponderance of the evidence. Now by use of the word preponderance is not meant necessarily a greater number of witnesses on one [fol. 119] side than on the other, but it is the quality of the testimony produced, rather than the quantity, and to determine that measure of preponderance it is necessary that all the evidence which has been produced be considered by you.

Now as I have said, if the plaintiff recovers or is entitled to recover he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive and that that negligence was the proximate cause of this accident. If he makes that out, unless, of course, the defendant makes out some defense, he is entitled to a verdict and to have you asses his damages. If he does not make that out, manifestly he ought not to have a verdict and the verdict should be, under such circumstances, for the defendant. That, you will observe, is practically all that is necessary to be said upon the question of the negligence of the defendant. Has the defendant been shown by the preponderance, by the greater weight of the evidence, to have been guilty of the charge of negligence made against it by the plaintiff, and has the plaintiff further shown that that negligence was the proximate cause of the plaintiff's intestate's injuries? If those things are made out by a greater weight of the evidence, as I said before, the plaintiff is entitled to a verdict and to have you asses his damages,—unless the defendant has made out a defense.

That brings us to consider what defenses are interposed by the defendant. Of course, one defense is that no negligence has been shown. That amounts to this, that the plaintiff has not made out his case; but that defense is [fol. 120] not one of the defenses concerning which I wish particularly to speak, because it follows that if the plaintiff has not made out his case, there is no case to defend against and the defendant is entitled to a verdict.

The defendant says that the plaintiff's intestate was guilty of contributory negligence. Now you will remember that I read to you a few minutes ago from the statute that in this kind of action, under the Federal Employers' Liability Act, contributory negligence does not bar the plaintiff's right of action, but it is to be taken into consideration unless it is the sole cause, so far as the evidence shows, of the accident itself. It is to be taken into consideration by the jury and so much must be deducted from the entire damage suffered by the plaintiff as is represented by his proportion of the joint negligence of himself and the defendant. Now what is meant by that? Suppose that the entire amount of the damage—and I use figures only to illustrate and I do not indicate by them that I have a notion that the plaintiff is entitled to a thousand dollars or not; I just use figures to illustrate—suppose that the entire damage was a thousand dollars and suppose that the evidence showed that the plaintiff by his negligence had contributed one-half to the production of the result of which he complains and the other half was due to the negligence of the defendant. You see how it is easy to figure it out under the statute. If the plaintiff is one-half guilty you must determine the entire damage; you must diminish the entire damage by one-half of it. If the plaintiff's negligence contributed one-quarter and the defendant's negligence three-quarters, manifestly you would deduct the one-quarter. Now, that illustrates to you the manner in which that rule is applied, and that is [fol. 121] all there is to that phase of it; but the defendant is entitled to have the advantage, and claims the advantage and is entitled to have an allowance for whatever contributory negligence is shown in the case to be chargeable to the plaintiff's intestate and to have you subtract that amount of negligence from the entire amount of negligence

in the case and reflect the result of that subtraction from your verdict in the manner in which I have indicated.

Now, that brings us to inquire: What is the contributory negligence of which we have been talking? The law says that the duty of this plaintiff in the employment in which he was engaged—and when I speak of the plaintiff I mean the plaintiff's intestate, the man who was killed—was to use reasonable care for his own safety, and by reasonable care is meant such care as a reasonably prudent person would use under the circumstances. Now, if this man Marcone did not use reasonable care for his own safety, then you say whether or not his neglect to use that care contributed to the accident, and if it did then you say how much, a quarter, a third, a half, three-quarters, or what? And to whatever extent it did contribute, if the defendant is liable, you subtract that proportion which its negligence bears to the joint negligence of the two and that would be your verdict, if you find for the plaintiff.

Now, gentlemen, a servant assumes the usual and obvious risks of his employment and those which he could discover with ordinary care, but of course not the negligence of his employer. An employee assumes the risk not only of dangers arising from facts known to him but also of such dangers attending his work as he might discover by the exercise of reasonable care for his own safety. The doc- [fol. 122] trine of assumption of obvious risks by the servant applies as well to those which arise or become known to the servant during his services as to those in contemplation at the original hiring.

Now, gentlemen, so much for the question of law as to whether or not the plaintiff is entitled to a verdict.

If the plaintiff is entitled to a verdict then you come to the question of the assessment of damages, and to determine that point you must consider what is the loss that a person sustains by the death of someone because of the negligence of a defendant; and that is a question that depends largely upon conjecture, depends largely upon speculation. The intestate in this case might have been killed the next day in another accident. The next of kin here might themselves have died shortly after the accident. The intestate might have become disabled from performing productive services and instead of having been a bread-winner he might merely have become a bread-con-

sumer. He might have gotten married and supported his wife instead of giving anything to his parents. Let me say to you that the only damage that can be allowed is the pecuniary damage suffered. You cannot allow anything to solace the persons because they have lost someone that is dear to them. You cannot allow anything for funeral expenses or doctors' bills because that is not what is permitted by the statute. The statute known as the Death Act, which I have before referred to, only permits the allowance of so much, if they are entitled to anything, as the persons would have gotten in a money sense if it had not been for the untimely cutting off of life by the accident upon which the [fol. 123] action is predicated. All other considerations of suffering or anything of that sort are entirely eliminated from a case of this kind and no allowance can be made on that account. You must further consider, if you consider the question of damages, that the only thing you can allow in a case of this kind is the present value of a sum, not a sum that would be the amount that the next of kin would have gotten, because under those circumstances you would give too much; they would get not only the interest on the money; they would have the money itself at the end of the whole time; and therefore you find the present value of the money, and that would be the sum only that you would be entitled to allow in a case of this kind, if you allow any amount.

Now, gentlemen, you are not to allow prejudice, bias or sympathy to guide you in any particular in determining your verdict in this case. You are simply to be guided by the facts and by the law that the Court has given you. Let me say to you that you are the sole judges of the facts. You are not to be guided by what counsel has said in regard thereto or by what the Court has said, but you are to take your own recollections of what the facts have been as related to you by the witnesses and be guided by those recollections that you have of those facts and the law that the Court has given you.

The Court has dealt with several motions during the course of the trial. You are not to be guided in any particular by the finding of the Court in regard to those motions. Those were legal duties which the Court had to determine and should not be a guide to you in any particular.

[fol. 124] I have had several requests to charge by the defendant.

(Addressing Mr. Carey:) I think I have charged the first two, Mr. Carey.

Number three. If the proximate cause of the injuries which resulted in the death of plaintiff's intestate was his negligence, plaintiff cannot recover.

I so charge you.

Number four. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

I so charge you.

Number five. Decedent, being of full age, he would not be obligated to contribute to the support of his parents, or either of them, unless or until they or one of them shall have been adjudged to be a poor person and unable to maintain himself or herself, or those dependent upon him or her, and unless and until decedent should have been found of sufficient financial ability to contribute to their support. In such event, the other children of decedent's parents, being of equal financial ability, would be equally obligated to contribute pro rata toward the support of said parents.

I so charge you.

Number six. Whether the intestate was engaged in interstate commerce or not depends upon what he was doing at the time of the accident.

I so charge you.

You may take the case.

(Thereupon the jury retired.)

Mr. Carey: I wish to note an objection to the submission to the jury of the question whether the intestate was at [fol. 125] the time of the accident engaged in interstate commerce and to the language which the Court used in submitting that question to the jury.

I wish to note an objection also to the submission by the Court to the jury of the question of defendant's negligence and to the language which the Court used in submitting that question to the jury.

I wish to note an objection also to the charge of the Court with respect to contributory negligence and the language which the Court used in submitting that question to the jury. My contention is that the negligence of the plaintiff's intestate alone produced the accident, and not in conjunction with negligence on the part of the defendant.

Mr. Simpson: May I have an objection in the nature of an exception to that part of your Honor's charge which refers to the question of interstate commerce and everything your Honor said on that subject?

The Court: Yes.

Mr. Simpson: And also an objection in the nature of an exception to your Honor's charge that if the negligence of the plaintiff's intestate was the proximate cause of the injury the plaintiff could not recover.

The Court: I said if that alone was the proximate cause. But you may have an objection.

Mr. Simpson: And also may I have an objection in the nature of an exception to your Honor's charging the defendant's requests to charge, to each and all of them?

The Court: Yes.

DEFENDANT'S REQUESTS TO CHARGE

1. If at the time of receiving the injuries resulting in the death of plaintiff's intestate, he was not engaged in interstate commerce, plaintiff cannot recover.

2. Unless some act of negligence alleged in the complaint has been established against the defendant, plaintiff cannot recover.

3. If the proximate cause of the injuries which resulted in the death of plaintiff's intestate was his negligence, plaintiff cannot recover.

4. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

5. Decedent being of full age, he would not be obligated [fol. 126] to contribute to the support of his parents, or either of them, unless or until they or one of them shall have been adjudged to be a poor person and unable to maintain himself or herself, or those dependent upon him

or her, and unless and until decedent should have been found to be of sufficient financial ability to contribute to their support. In such event, the other children of decedent's parents, being of equal financial ability, would be equally obligated to contribute pro rata toward the support of said parents.

6. Whether the intestate was engaged in interstate commerce or not depends upon what he was doing at the time of the accident.

In Circuit Court of Hudson County

Donato Morcone, Administrator of the Estate of Joseph Morcone, Deceased, Plaintiff,

v.

New York Central Railroad Company, a Corporation, Defendant

Action at Law

Rule for Final Judgment

This case was tried at the Hudson County Circuit Court before Honorable A. Dayton Oliphant, Judge, and a jury, on May 4th and 7th, 1928.

Evidence having been adduced by both parties, hereto, the jury considered same and returned a verdict in favor of the plaintiff herein and against the defendant herein, [fol. 127] and assessed the damages in the sum of seven thousand ($7,000.00) dollars.

It is therefore ordered and adjudged that the plaintiff Donato Morcone, administrator of the Estate of Joseph Marcone, deceased, have and recover of the defendant, New York Central Railroad Company, a corporation, the sum of Seven thousand ($7,000.00) dollars together with costs, and it is further ordered and adjudged, that judgment final be, and it is hereby, entered, in favor of the Plaintiff Donato Morcone, administrator of the Estate of Joseph Morcone, deceased, and against the defendant New York Central Railroad Company, a corporation.

A. Dayton Oliphant, Judge.

Rule actually entered this 7th day of May, 1928, on motion of Alex. Simpson, Attorney for Plaintiff.

In Circuit Court of Hudson County

Judgment

Judgment on Verdict in the above entitled cause was entered in this Court on the 7th day of May in the year of our Lord One Thousand Nine Hundred and Twenty-eight in favor of the Plaintiff, Donato Morcone, Administrator of the Estate of Joseph Morcone, deceased, and against the defendant New York Central Railroad Company, a corporation in a plea of Action at Law for the sum of Seven Thousand Dollars damages and costs of suit to be taxed.

Judgment signed this 7th day of May A. D. 1928.

John J. McGovern, Clerk.

[fol. 128] In Circuit Court of Hudson County

[Title omitted]

Notice of Appeal—Filed May 15, 1928

To Alexander Simpson, Esq., Attorney for Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the Circuit Court of Hudson County in the above stated cause May 7th, 1928.

Dated May 15, 1928.

Wall, Haight, Carey & Hartpence, Attorneys for Defendant.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 15th day of May, 1928.

Alex. Simpson, Attorney for Plaintiff.

[fol. 129] In Circuit Court of Hudson County

Recognizance—Filed May 19, 1928

Recognizance on appeal in this action in the sum of $14,200, duly entered into before George G. Tennant, Su-

preme Court Commissioner, by the defendant-appellant, New York Central Railroad Company, as Principal, and National Surety Company, as Surety, in favor of the plaintiff-respondent, was filed herein May 19, 1928.

In Court of Errors and Appeals of New Jersey

Donato Marcone, Administrator of the Estate of Joseph Marcone, Deceased, Plaintiff-Respondent,

v.

New York Central Railroad Company, Defendant-Appellant

Action at Law

Grounds of Appeal—Filed June 1, 1928

The appellant states the following grounds of appeal:

1. The Court overruled defendant's motion for judgment of nonsuit.

2. The Court overruled defendant's motion to direct a verdict in its favor.

The Court overruled the following question-:

[fol. 130] 3. To the witness, Cornelius McGee:

"Q. Did you take this engine out this night at about the usual time you are accustomed to take the engine out for this particular train?"

4. To the witness, James H. Kelly:

"Q. The hostler has testified that he moved the engine out of the roundhouse about 2:30. Could you say whether that was too early or otherwise?"

5. To the witness, James H. Kelly:

"Q. If an engine was to be taken, or if the time scheduled for the train crew to take an engine was 3 o'clock, will you state whether or not moving the engine out of the roundhouse at 2:30 would be too early?"

The following questions were admitted against defendant's objections:

6. To the witness, Cornelius McGee:

"Q. Did you go to the board to look what time this engine was supposed to leave before you moved this engine that was in the accident?

"Q. Did you go to this board?"

7. To the witness, Cornelius McGee:

"Q. Did you go to this board in the roundhouse where it stated engine so and so is scheduled to leave at such and such a time? Did you go to that board in question?"

8. The Court overruled defendant's motion to strike out all the testimony with respect to the alleged conversation between the Assistant Foreman Kelly and Mr. McGee with reference to the early taking out of the engine.

[fol. 131] 9. The Court charged the jury as follows:

"You will notice that a prerequisite to a suit under this statute is that both the defendant and the deceased in this case were engaged in interstate commerce at the time of the accident. The defendant admits that it was engaged in such commerce but denies that the deceased was. Therefore the first question for you to determine is whether or not Joseph Marcone at the time in question was engaged in interstate commerce; and you must determine from all the facts and all the circumstances in the case at the time of the happening in question, was the intestate engaged in and about a duty which he owned to his master, the defendant company, with respect to interstate commerce, or had he removed himself from that employment? Had he taken himself out of that relationship that had existed as between himself and the defendant company so that he was not at the time of the happening in question engaged in any act which he was called upon as the servant of the defendant company to perform in relation to and with respect to the interstate commerce of the defendant company?"

10. The Court charged the jury as follows:

"Now, if you should pass that point you will have observed from what I have read from the statute that the

basis of an action of this kind is founded upon negligence, and that logically brings us to consider what the negligence is which the plaintiff in this case claims this defendant was [fol. 132] guilty of, and that is the charge as contained in the written complaint. The plaintiff in his complaint says that the negligence of the defendant consisted in this: 'That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; that it did not use reasonable care to equip said locomotive with suitable headlights or any headlights or any lights and did not use reasonable care to propel same at a safe rate of speed.' Now, the plaintiff relies on that part of the complaint which charges that the defendant did not give warning of the movement of this locomotive."

* * * * * * *

"Now, as I have said, if the plaintiff recovers or is entitled to recover he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive and that that negligence was the proximate cause of this accident. If he makes that out, unless, of course, the defendant makes out some defense, he is entitled to a verdict and to have you assess his damages."

11. The Court charged the jury as follows:

"The defendant says that the plaintiff's intestate was [fol. 133] guilty of contributory negligence. Now, you will remember that I read to you a few moments ago from the statute that in this kind of action, under the Federal Employers' Liability Act, contributory negligence does not bar the plaintiff's right of action, but it is to be taken into consideration unless it is the sole cause, so far as the evidence shows, of the accident itself.

Served May 31, 1928.
Filed June 1, 1928.
Wall, Haight, Carey & Hartpence, Attorneys for Defendant-Appellant.

[fol. 133½] EXHIBIT D-1

(Here follows diagram, side folio page 134)

[fol. 135] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY, OCTOBER TERM, 1928

#65

DONATO MARCONE, Administrator of the Estate of Joseph Marcone, Deceased, Plaintiff-Respondent,

v.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant

Argued October 23, 1928. Decided January —, 1929

On Appeal from Hudson County Circuit Court

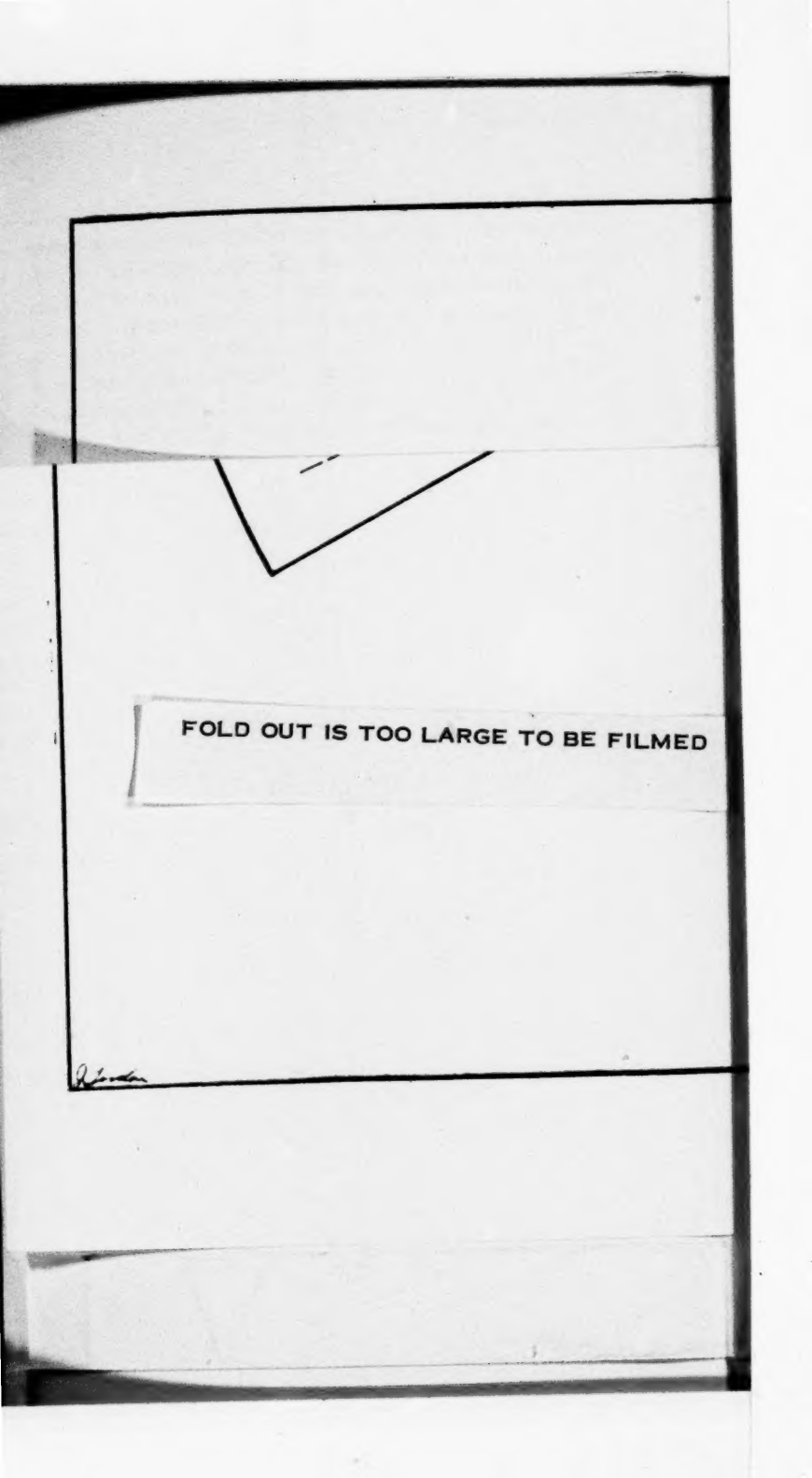
For Appellant: Wall, Haight, Carey & Hartpence.
For Respondent: Alexander Simpson.

OPINION—Filed Feb. 4, 1929

The opinion of the court was deliverel by LLOYD, J.:

This is an appeal by the defendant from a judgment in favor of the plaintiff in the Hudson County Circuit Court. The action was under the Federal Employers' Liability Act to recover damages for the death of an employee claimed to be due to the negligence of the defendant while deceased was in interstate commerce employment. In addition to certain alleged trial errors appellant contends that the case should have been controlled by the court through nonsuit on two grounds: (1) that the deceased was [fol. 136] not at the time in interstate commerce; and (2) even if he were, that no negligence was shown.

Deceased was one of a gang of men whose duties were to make minor repairs on engines and to lubricate the engine boxes and grease cups. He had been at this work for approximately a year. On July 27, 1926, he began work at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seven o'clock in the evening and his duties were to end at three o'clock the following morning. He worked on a number of engines during the night, the last one of which appears to have been #3825, an engine in interstate commerce. At two-fifteen o'clock of that morning he was told by his foreman to finish his work on that engine and wait there for further orders. While standing on or near track designated at #8, he was struck and killed by engine #3709 backing out of the roundhouse without warning. No one saw the deceased when he was killed nor did any one actually see what he was last doing.

It is claimed by the appellant that in this situation there was no proof that at the time of the accident his work on engine #3825, which was used in interstate commerce, had not been finished, and that plaintiff's proofs failed to establish any negligence in the defendant.

We think there was sufficient evidence in the case to justify a finding that he was engaged in interstate commerce when killed. He had been told to finish his work on an engine in interstate commerce. His duties generally were in both interstate and intrastate commerce; his hours of duty had not yet expired and when last seen, but a few minutes before his death, he was at work on this particular engine. The case could not, therefore, have been withdrawn from the jury on this ground.

[fol. 137] As to the contention that there was no negligence shown, the specific negligence alleged in the complaint and upon which the court submitted the case to the jury was that engine #3709 was moved without warning in disregard of a posted notice that it would be moved at three o'clock; that it was actually moved out of the roundhouse between two-twenty and two-thirty o'clock; and that the hour of its movement was posted for the express purpose of apprising the workmen when it would be moved. It seems to have been established that a whistle was blown and the bell was rung on the engine, but the evidence is that this as a warning was inadequate because whistles and bells were sounding "around there" at all times. The engine backed out of the roundhouse in advance of the time posted with no one on its rear end. In view of the premature movement of this engine in a backward position with-

out guard on its rear at a time when deceased had reasonable ground to believe that it would not be moved, it was permissible for a jury to infer that the defendant had not performed the full measure of its duty to the deceased.

The rulings on evidence and the portions of the charge complained of are not we think subject to just criticism, nor do they call for discussion in this opinion.

The judgment is affirmed.

[File endorsement omitted.]

[fol. 138] In Court of Errors and Appeals of New Jersey

Donato Marcone, Administrator of the Estate of John Marcone, Deceased, Plaintiff-Respondent,

v.

New York Central Railroad Company, Defendant-Appellant

On Appeal from Hudson County Circuit Court

Order on Affirmance of Judgment—Filed Feb. 4, 1929

This cause having been duly argued at the October Term, 1928, of this court by Alexander Simpson of counsel for the respondent, and Wall, Haight, Carey & Hartpence, of counsel for the Appellant, and the Court having considered the same, and finding no error in the record or proceedings in the Hudson County Circuit Court,

It is thereupon, on this fourth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, ordered and adjudged that the judgment of the Hudson County Circuit Court, in this cause, be affirmed with costs; and that the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Alex Simpson.

A true copy. Joseph F. S. Fitzpatrick, Clerk.

[File endorsement omitted.]

[fols. 139-154] Petition for rehearing, covering 15 pages, omitted from this print. It was denied and nothing more by order April 19, 1929.

[fol. 155] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order to Return Record, etc.

This Court having, on February 14, 1929, directed that the remittitur in above stated cause be withheld pending the determination of an application by the defendant-appellant for a reargument of the case; and it appearing that notwithstanding said order the record was through inadvertence remitted to the Hudson County Circuit Court on February 15, 1929; and due notice of this motion having been given to the Attorney for the plaintiff-respondent,

It is therefore, on this 21st day of March, A. D. 1929, on motion of Wall, Haight, Carey & Hartpence, attorneys for the defendant-appellant, ordered that the Hudson County Circuit Court do forthwith return to this Court the record in said cause, and that the same be thereupon retained by this Court until its further order therein, pursuant to its said direction of February 14th, 1929.

A true copy. Joseph F. S. Fitzpatrick, Clerk.

[fol. 156] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order Denying Rehearing

The Defendant-Appellant, New York Central Railroad Company, by permission of this Court granted February 14, 1929, having filed a petition herein for a rehearing of this cause, and the Court having considered said petition;

It is on this 19th day of April, 1929, Ordered that said petition be and the same hereby is denied, and that said petition be and the same hereby is dismissed.

E. R. Walker, Chancellor and President Judge of the New Jersey Court of Errors and Appeals.

A true copy. Joseph F. S. Fitzpatrick, Clerk.

[fol. 157] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order Staying Execution

The judgment of the Hudson County Circuit Court in the above entitled action having been affirmed by this Court on February 4, 1929, and on February 14, 1929, this Court having ordered that the record be retained in this Court until its further order, and having on that date granted leave to defendant-appellant to file a petition herein for a rehearing of this cause, and petition for a rehearing having been duly filed and considered and denied by this Court on the 19th day of April, 1929; and the defendant-appellant having represented to this Court that it desires to make application to the United States Supreme Court for a writ of certiorari to review the judgment so affirmed, and is now preparing said application therefor;

It is on this 25th day of April, 1929, Ordered that all proceedings by way of execution on said judgment and for its enforcement be and the same are hereby stayed until the further order of this Court;

And it further appearing that a recognizance on appeal [fol. 158] to this Court has been entered into by the defendant-appellant, as principal, and the National Surety Company, as surety, in favor of the plaintiff-respondent, in the sum of $14,200, being more than double the amount of said judgment and costs;

It is further ordered that said recognizance be and the same hereby is approved as good and sufficient security for the plaintiff-respondent pending the application of the defendant-appellant for said writ of certiorari, and until the final disposition of said writ, if granted. This order is made in virtue of Title 28, Section 350, of the U. S. Code Annotated (1928), which authorizes a Judge of the Court rendering the judgment to grant a stay, pending application for a writ of certiorari.

E. R. Walker, Chancellor and President Judge of the New Jersey Court of Errors and Appeals.

[fol. 159] In Court of Errors and Appeals of New Jersey

[Title omitted]

Check List—Filed Feb. 4, 1929

The Chancellor presiding.
Opinion by Lloyd, J.

	Affirm	Reverse	Modify
The Chancellor	1		
" Chief Justice	1		
Mr. Justice Trenchard	1		
" " Parker		1	
" " Katzenbach	1		
" " Campbell		1	
" " Lloyd	1		
Judge Van Buskirk	1		
" McGlennon	1		
" Hetfield		1	
" Dear	1		
Totals	8	3	

[File endorsement omitted.]

[fol. 160] In Court of Errors and Appeals of New Jersey

[Title omitted]

Notice of Motion to Recall Record—Filed Mar. 21, 1929

Please take notice that at the State House in the City of Trenton, on the 21st day of March, 1929, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall move before this Court for an order directing the Clerk of the Circuit Court of Hudson County to return to this Court the record in the above entitled cause, and that said record be retained by this Court pursuant to the order made herein on the 14th day of February, 1929.

Dated March 18th, 1929.

Yours respectfully, Wall, Haight, Carey & Hartpence, Attorneys for Defendant-Appellant.

To Alexander Simpson, Esq., Attorney for Plaintiff Respondent.

Service of a copy of the within notice is hereby acknowledged this 18th day of March, 1929.

Alex. Simpson, Attys. for Pltff-Respt.

[File endorsement omitted.]

[fol. 161] In Court of Errors and Appeals of New Jersey

[Title omitted]

Notice of Motion to Retain Record—Filed April 25, 1929

Please take notice that on Thursday, the 25th day of April, 1929, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the State House, Trenton, New Jersey, we shall move for an order retaining the record in the above entitled action in said Court of Errors and Appeals to await the outcome of a petition by the defendant-appellant to the Supreme Court of the United States for a writ of certiorari to review the judgment and proceedings herein.

Dated April 20th, 1929.

Yours respectfully, Wall, Haight, Carey & Hartpence, Attorneys for Defendant-Appellant.

To Alexander Simpson, Esq., Attorney for Plaintiff-Respondent.

Service of the within notice is hereby acknowledged this 22nd day of April, 1929.

Alex. Simpson, Attorney for Plaintiff-Respondent.

[File endorsement omitted.]

[fol. 162] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order Retaining Record—Filed April 25, 1929

Due notice having been given of a motion for this order;

It is, on this 25th day of April, 1929, ordered that the record herein be retained in this Court to await the outcome

of a petition by the defendant-appellant to the Supreme Court of the United States for a writ of certiorari to review the judgment and proceedings herein.

E. R. Walker, C. & P. J.

[File endorsement omitted.]

[fol. 163] In Court of Errors and Appeals of New Jersey

[Title omitted]

Notice of Motion to Dismiss Order Staying Execution—Filed May 17, 1929

To Wall, Haight, Carey & Hartpence, Esqs., Attorneys for Defendant-Appellant.

Sirs: Please take notice that on the third Tuesday of May, 1929, at 11 o'clock daylight savings time or as soon thereafter as counsel can be heard, I shall move the New Jersey Court of Errors and Appeals at the State House, Trenton, N. J. to dismiss an Order staying execution in the above entitled cause made on the 25th day of April, 1929, for the following reason:

Failure on the part of the defendant-appellant to make and/or to file application in the United States Supreme Court for a Writ of Certiorari within three months from the date of the entry of judgment herein entered in this Court on February 5, 1929.

Yours, &c., Alexander Simpson, Attorney for Plaintiff-Respondent.

Service of the within notice is hereby acknowledged this 15th day of May, 1929, but without prejudice.

Wall, Haight, Carey & Hartpence, Attorneys for Deft. Applt.

[File endorsement omitted.]

[fol. 164] Clerk's certificate to foregoing Transcript omitted in printing.

[fol. 165] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,343. New Jersey Court of Errors and Appeals. Term No. 212. New York Central Railroad Company, petitioner, vs. Donato Marcone, as administrator of the estate of Joseph Marcone, deceased. Petition for writ of certiorari and exhibit thereto. Filed July 1, 1929. File No. 34,343.

LE COPY

FILED
JUL 1 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 212

NEW YORK CENTRAL RAILROAD COMPANY
Petitioner

against

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased
Respondent

Petition for Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey, and Brief in Support of Petition

ALBERT C. WALL
Counsel for Petitioner

APPEAL PRINTING CO., 20 THAMES ST., NEW YORK CITY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

v.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The New York Central Railroad Company, the petitioner herein, respectfully represents:

1. This action was brought in the Circuit Court of Hudson County, New Jersey, under the Federal Employers' Liability Act, by the respondent (plaintiff below) against petitioner (defendant below) to recover damages

for the death of Joseph Marcone, deceased, respondent's intestate.

2. Decedent was run over by petitioner's engine No. 3709 on track 8 at its roundhouse at New Durham. At the time of his death he was employed by petitioner to pack journal boxes and otherwise lubricate petitioner's engines, some of which were used in interstate and some in intrastate commerce.

3. The complaint alleges that decedent was employed by petitioner in interstate commerce at its New Durham roundhouse, where it negligently propelled against him a locomotive which ran over and killed him; that petitioner's negligence consisted in the failure to use reasonable care to keep said locomotive under control, to give warning of the movement thereof, to keep the same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injuring decedent; that petitioner failed to equip the locomotive with suitable headlight or any light, and did not use reasonable care to propel the same at a safe rate of speed (Record, p. 1, line 30, to p. 2, line 25).

4. The answer denies that at the time of the accident decedent was engaged in interstate commerce; denies any negligence on its part and alleges as affirmative defences that the injuries sustained by decedent arose out of his negligence in going and standing upon a railroad track operated by petitioner at a time when it was unnecessary, improper and obviously dangerous for him so to do; that at the time and place of the accident decedent was a mere licensee and at the time of the accident he was not engaged in interstate commerce (Record, p. 3, line 25, to p. 4, line 20).

5. On May 7th, 1928, respondent recovered judgment against petitioner for the sum of $7,000 with costs (Record, p. 126, line 20).

6. Petitioner appealed from said judgment to the New Jersey Court of Errors and Appeals in the Last Resort in all Causes, and that Court on February 4, 1929, affirmed said judgment by a divided court, eight members thereof voting to affirm and three to reverse (Record, pp. 138, 159).

7. On February 14, petitioner moved before said Court of Errors and Appeals for leave to file a petition for a rehearing of said cause. The motion was granted, and it was ordered that the remittitur be held in that Court pending the determination of the petition for rehearing.

8. Pursuant to the leave granted on February 14, 1929, a petition for reargument was presented to said Court of Errors and Appeals on February 25, 1929 (Record, p. 139).

9. Notwithstanding the order that the remittitur be retained in the Court of Errors and Appeals to await the determination of the petition for rehearing, it was inadvertently sent down to the Hudson County Circuit Court, and on March 21, 1929, an order was made by said Court of Errors and Appeals that the record be returned to said Court, and be there retained by that Court until its further order, pursuant to its direction of February 14, 1929 (Record, p. 155).

10. On April 19, 1929, the petition for rehearing was denied and the petition dismissed (Record, p. 156).

11. On April 25, 1929, an order was entered in said Court of Errors and Appeals directing that the record be retained in that Court to await the application by peti-

tioner for a writ of certiorari to the Supreme Court of the United States, and on the same date an order was entered staying execution on said judgment (Record, p. 157).

12. Permission having been granted by the Court of Errors and Appeals to file a petition for a rehearing, the time for applying for a writ of certiorari from this Court began to run on April 19th, 1929, the date when the petition for rehearing was denied.

Respondent gave notice of a motion to dismiss the order staying execution, but abandoned said motion (Record, p. 163). No order was made thereon.

The Matters Involved.

13. The questions presented on this application are:

(a) At the time of the accident was respondent's decedent engaged in interstate commerce?

(b) Was the evidence in the cause sufficient to charge petitioner with negligence?

(c) Was decedent's death due (1) to his own negligence; (2) to his disobedience of petitioner's orders?

Summary of Facts.

14. Petitioner is a common carrier engaged in interstate and intrastate commerce. It operates a roundhouse at New Durham, New Jersey, in which are thirty-two engine stalls. Adjacent thereto and distant 68.3 feet from the rear doors thereof is a turntable. From these stalls engines are backed onto this turntable. The number of engines in the engine house varies materially. Sometimes the stalls are full, and other times but few stalls are occupied (Record, p. 68, line 12; Exhibit D-1, p. 159).

15. On the tracks in the roundhouse engines are inspected and put in condition for road service in either interstate or intrastate commerce (Record, p. 67, line 30).

16. Decedent was a member of a night inspection gang whose leader was Siddell. He was a box packer and lubricator. His duties were to pack journal boxes of the drive wheels of engines, and when requested, to fill the grease cups on these engines (Rcored, p. 40, line 40; p. 68, line 17; p. 70, line 30). He had been a member of this gang, doing this work under this leader for about one year, and had come to Siddell from a similar day gang (Record, p. 70, line 25). His place of work was in the roundhouse, and from long experience he was thoroughly familiar with the work and with the conditions in the roundhouse under which the work was carried on (Record, p. 68, line 25; p. 71, line 11; p. 100, line 22). This gang had an "inspection wagon" on which their tools, including the tools of decedent, were moved from engine to engine as their work progressed. This wagon was always moved along the concrete runway about ten feet wide which extended in front of all the engine stalls along the entire outer circumference of the roundhouse (Record, p. 72, line 40, to p. 73, line 22; p. 101, line 38, to p. 102, line 8).

17. On the night of the accident he began work at 7 P. M. and was to have quit at 3 A. M. (Record, p. 40, line 35; p. 101, line 10). On this night, prior to the accident, decedent had worked on fourteen engines. The last engine he lubricated was No. 3835 located on track 7. At about 2:15 A. M., the other members of the gang had finished their work on this engine, and the leader Siddell took all the men except decedent to do some work on an engine located a short distance outside the roundhouse. Before leaving, Siddell told decedent to finish his work

on engine 3835 and wait for him (Siddell) at the inspection wagon which was then located on the concrete runway in front of the engine stalls at a point in line with the open space between track 7 on which engine 3835 was located, and track 8 on which engine 3709 was located (Record, p. 68, line 30 to p. 69, line 22; p. 72, line 10 to line 38; p. 73, line 8; p. 101, line 15 to p. 102, line 5; p. 105, line 38 to p. 106, line 12).

18. Decedent was last seen alive at about 2:15 A. M., when Siddell left him at work on engine 3835 on track 7 (Record, p. 70, line 5). At about 2:35 decedent's dead body was discovered underneath the trucks of the tender of engine 3709 on track 8. That engine was then being backed on track 8 from the roundhouse to the turntable. The body when discovered was between the two rear trucks of the tender or in front of the second trucks from the rear, on the right-hand rail of track 8 adjacent to track 9 (Record, p. 17, line 38, p. 34, line 1; p. 64, line 35; p. 65, line 25; p. 82, line 10; p. 84, line 1; p. 35, line 20; Exhibit D-1, p. 134, showing X marks indicating the position of body on diagram of engine and on right side of track 8). The body was on or near the turntable (Record, p. 10, line 10; p. 35, line 20). Decedent's cap was found between the rails of track 8 about fifteen feet outside the door of the roundhouse. Blood stains were found on the right-hand side and rail of track 8, adjacent to track 9, beginning about thirty feet from the roundhouse and extending to the point where the body was found near or on the turntable. Marks as of something dragging were found along that rail beginning at a point where the blood stains were found (Record, p. 11, line 30; p. 36, line 12; p. 100, line 10; p. 85, line 20; p. 84, line 1). It is thus apparent that decedent was struck about midway between the door of the roundhouse and the turntable, and that he was run over on the right-hand rail

of track 8, *i. e.*, the far rail from track 7 and the rail adjacent to track 9.

19. Decedent had lubricated and completed his work on engine 3709 on track 8 before eleven o'clock, nearly four hours before the accident. He had no reason thereafter to go near that engine or upon track 8 where he was run over (Record, p. 71, line 20).

20. Siddell returned to the inspection wagon on the concrete runway about 2:35 or 2:40 A. M. Decedent was not there. He began writing his report of the night's work at the inspection wagon when he was informed that an accident had happened at the turntable. He then examined engine 3835 and found that all of decedent's work on that engine had been completed (Record, p. 69, line 5 to p. 70, line 25; p. 74, line 1; p. 97, line 30 to p. 98, line 15; p. 105, line 30). Siddell found all decedent's tools in place on the inspection wagon ready for removal from the roundhouse at quitting time (Record, p. 72, line 40; p. 98, line 15). None of his tools were found at or near the place where the accident happened (Record, p. 11, line 28; p. 83, line 10; p. 98, line 30). Siddell had no work for decedent after he had completed the work on 3835 (Record, p. 74, line 10; p. 106, line 32 to line 40).

21. There was no eye-witness to the accident. When, how or why decedent went to the place of the accident on the right-hand side of track 8, adjacent to track 9, is a matter of conjecture; that he had no work to do there is apparent. He was not attempting any work, for he had no tools with which to work.

22. Hostlers back the engines out of the roundhouse on to the turntable, and after they are turned they take

them to the water plug, about 300 feet from the turntable, where the engine crews take charge of them (Record, p. 26, line 18).

23. McGee, the hostler, who removed engine 3709 from the roundhouse on the night of the accident, testifies that he entered stall 8 at the rear of the engine, walked along its left side to the front, adjusted the cylinder cocks, and then passed in front of the engine, and along its right-hand side to the rear. He removed the two chains which blocked the drive wheels, and as he did this he looked underneath the engine to see if there were any obstructions or anyone working there. After reaching the rear of the engine on the right-hand side, he returned on that side to the cab, and mounted the engine. This was about 2:20 A. M. He then started the air pump to get up the air pressure, turned on the engine lights—headlight, rear light and cab lights (about twelve in all)—started the engine bell ringing by compressed air, and it continued ringing until after the accident (Record, p. 27, line 25; p. 29, line 18; p. 37, line 18; p. 51, line 5, to p. 55, line 20; p. 64, line 12; p. 67, line 8). When the air pump had been in operation from five to seven minutes, he sounded three blasts of the whistle as a warning that he was about to back the engine out and as notice to the operator of the turntable to set it for track 8. This was about 2:30 A. M. He then started backing the engine toward the turntable at about four miles per hour, looking behind as he did this. The operator of the turntable did not respond promptly and McGee stopped the engine, blew three more blasts, and when the turntable was set, he again started backing the engine (Record, p. 29, line 34; p. 55, line 18; p. 56, line 30, to p. 57, line 12; p. 63, line 20, to p. 64, line 12). Just as the tender was near the turntable the operator noticed something dragging between the

right-hand rear wheels of the tender and gave McGee a stop signal. The engine was stopped immediately just as the tender was entering upon the turntable. The object dragging at the rear wheels of the tender was discovered to be decedent's body. When the engine was stopped, the body was either wholly or partially on the turntable, and lying partially across the right-hand rail of track 8 (Record, p. 30, line 27; p. 33, line 38, to p. 34, line 10; p. 35, line 18; p. 62, line 20; p. 63, line 20, to p. 65, line 40; p. 82, line 8, to p. 83, line 8; p. 93, line 5).

24. When McGee approached engine 3709 at the rear, and when he was walking around it prior to boarding it, no one was working on that engine, or on engine 3835 on track 7, or on the engine on track 9 (Record, p. 28, line 1; p. 38, line 25; p. 59, line 20; p. 96, line 1).

25. Maloy, the turntable operator, saw no one near the rear of engine 3709 when he set the turntable for it (Record, p. 66, line 10). The hostler looked to the rear as he was backing out, and did not see decedent. When backing the engine the tender cut off the view of the track to the rear for about twelve feet (Record, p. 56, line 9).

26. The time the engine crew was to take charge of the engine and put it into service was posted on a blackboard in the roundhouse. That posted time had nothing to do with the time the engine was to be backed out of the roundhouse. Engine 3709 was scheduled to leave the vicinity of the roundhouse in charge of the road engine crew at 3 A. M. Due to the delay occasioned by the accident it actually left at 3:18 A. M. (Record, p. 22, line 32; p. 23, line 15; p. 25, line 10; p. 46, line 18). The first impression from the testimony of Mr. Weiss might be that the engine was to be backed out of the roundhouse by the hostler at 3 A. M. He later makes it entirely clear

that the records from which he testified showed the time when the engine was to be taken by the engine crew from the place where it was left by the hostler, and not the time it was to be backed from the roundhouse (Record, p. 24, line 26; p. 25, line 10). McGee, the hostler, always delivered engines at the place where the engine crew were to take them a half hour before the crew were to leave with them. On the night of the accident he took engine 3709 out of the roundhouse at the usual time (Record, p. 57, line 30 to p. 58, line 10). A half hour before the engine crew was to take the engine from the vicinity of the roundhouse would not be too early to back it out of the roundhouse (Record, p. 108, line 10 to line 35).

27. The instructions not to move the engines too early were merely intended to prevent track congestion at the water plug where the engines were left for the train crews (Record, p. 49, line 30).

28. While bells were ringing and whistles were sounding more or less frequently throughout the roundhouse, three blasts of the whistle had a distinct and well understood meaning; it was a "back-up" signal and a call for the turntable (Record, p. 55, line 30; p. 64, line 1).

Reasons Relied on for Allowance of the Writ.

1. The State Court of New Jersey has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(a) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(b) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(c) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

To this petition is annexed a supporting brief and with it is presented a certified transcript of the record and proceedings in the Hudson County Circuit Court and in the New Jersey Court of Errors and Appeals.

WHEREFORE petitioner prays that a writ of certiorari may be issued to the Court of Errors and Appeals of New Jersey where the record herein is now lodged, requiring that Court to certify said record and judgment to this Court to the end that the errors complained of may here be reviewed and corrected.

Dated June 15, 1929.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner.

By

ALBERT C. WALL,
Its Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

v.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The evidence is wholly insufficient to establish negligence on the part of the petitioner.

1. There was a complete failure to establish the negligence alleged in the complaint.

(a) The engine was under perfect control. It was moving about four miles per hour (Record, p. 56, line 38; p. 66, line 18). The turntable being but 68.3 feet from the rear doors of the roundhouse, the movement necessarily had to be very slow.

(b) All customary warnings of the movement of the engine were given. Three blasts of the whistle were

sounded just prior to starting the engine the first time, and also just prior to starting it the second time. The engine bell was rung before the engine was started. It continued to ring during the entire movement, and until after the accident. These were the only warnings given when engines were about to be backed out of the round-house (Record, p. 42, line 18; p. 55, line 16; p. 63, line 31; p. 88, line 16). Three blasts of the whistle was a "back-up" signal, indicating that the engine was about to be moved onto the turntable (Record, p. 43, line 25; p. 55, line 30; p. 64, line 1).

(c) There was no defect in the engine. It was in good condition (Record, p. 60, line 5).

(d) The engine was properly equipped with good head light, a light on the rear of the tender and cab lights, in all about twelve lights. They were all lighted before the engine was moved. These lights are not turned on until the engine is about ready to be moved (Record, p. 29, line 18; p. 37, line 16; p. 49, line 15; p. 55, line 8).

(e) The only question with respect to petitioner's negligence which the Trial Court submitted to the jury was whether warning was given of the impending movement of the engine (Record, p. 118, line 10 to line 25; p. 119, line 10 to line 25).

2. The evidence is undisputed that prior to the movement three blasts of the whistle were sounded, and that the bell was ringing during the entire movement and was still ringing after the discovery of decedent's body, and further, that these were the only customary warnings with respect to the movement of the engines. In addition, all the engine lights were lighted and the air pump was going. It was operated by steam, and was started about

ten minutes before the engine was started. It could be heard thirty to forty feet (Record, p. 54, line 9.) The lights on the engine and the operation of the air pump were of themselves, and without regard to the sounding of the whistle or the ringing of the bell, sufficient warning that the engine was about to be moved. From decedent's familiarity with the operations in the roundhouse he knew when these lights were on and the pump going the engine would very soon be moved.

3. The fact that whistles were sounded and bells rung in other parts of the roundhouse and at all times did not in any way render ineffective the warning of the three blasts of the whistle, which was the well-known "back-up" signal, and a call for the turntable. One in as close proximity to engine 3709 as decedent was could not fail to know that the hostler was about to back that engine out of the roundhouse, and he could not confuse the "back-up" signal with whistles sounded in other parts of the roundhouse.

4. Not only were all usual signals given, but within a very short time prior to the movement of the engine, careful observations were made all round and underneath engine 3709, and also of the two engines on adjacent tracks, 7 and 9, to ascertain if anyone was working on any of them, and no one was discovered. Petitioner had discharged its full duty to decedent and was in no way chargeable with negligence.

5. Under the Federal Employers' Liability Act, negligence must be established against defendant, otherwise there can be no recovery.

Seaboard Air Line R. Co. v. *Horten*, 233 U. S., p. 492;

Missouri Pacific R. R. Co. v. *Aeby*, 275 U. S. 426 (at p. 429);
Erie R. R. Co. v. *Winfield*, 244 U. S. 170 (at p. 172).

6. This case is brought under the Federal Employers' Liability Act and is governed by that act and by the principles of the common law as applied in the Courts of the United States.

Missouri Pacific R. R. Co. v. *Aeby*, 275 U. S., p. 426 (at p. 429);
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165 (at p. 169, bottom).

7. This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of death, the judgment of the State Court will be reversed.

Chicago, M. & St. P. R. Co. v. *Coogan*, 271 U. S., p. 472 (at p. 474), and cases cited in that opinion.

8. There was no eye-witness to the accident. The evidence wholly fails to disclose how it happened. The record leaves the whole matter in the realm of speculation and conjecture. This is insufficient to sustain the judgment.

Chicago, Milwaukee & St. Paul R. R. Co. v. *Coogan*, 271 U. S. 472 (at p. 478), and cases cited.

9. Not only did the respondent fail to fix negligence upon petitioner, but the evidence affirmatively demonstrated that it had been guilty of no negligence. Hence, petitioner was entitled to a judgment of non-suit, and at the close of the case to a directed verdict.

10. Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a non-suit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. v. *Groeger*, 266 U. S., p. 521;
Gulf M. & N. R. Co. v. *Wells*, 275 U. S., p. 455;
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165;
Western & Atlantic R. R. Co. v. *Hughes, Admrx.*, decided by this Court February 18, 1929, 73 U. S. Law Ed., Advanced Opinions, March 1, 1929, page 268.

The New Jersey Court of Errors and Appeals concedes that the bell was rung and the whistle sounded, but denies the adequacy of these warnings on the ground that bells and whistles "were sounding around there all the time," and implies that reasonable care required that a lookout should have been posted on the rear of the tender (Record, p. 137, line 15). The Court ignores the fact that the turntable man was at the rear of the engine; that the hostler kept a lookout toward the rear as he was backing out of the roundhouse; that the engine was moving only four miles per hour, and that in addition to the sounding of the bell and whistle, twelve lights on the engine and the air pump in action unmistakably indicated that the engine was about to be moved. Decedent was close to the engine and if giving any attention at all to his safety, he could not mistake the meaning of all these warnings.

Furthermore, the petitioner owed to decedent the duty of warning only when he was engaged in the performance

of his duties and while in a place where his duty called him. His duty did not call him to the place where the accident happened.

The State Court further held that the engine was prematurely moved in advance of the posted time, and when decedent had reasonable ground to believe that it would not be moved (Record, p. 137, line 19). This is a clear misapprehension of the evidence. The posted time was the time when the engine crew was to take charge of the engine for road service, and had no relation to the time it was to be moved by the hostler from the roundhouse (Record, p. 25, line 10; p. 46, line 18).

POINT II.

At the time of the accident, decedent was not engaged in interstate commerce.

The engine which ran over decedent was No. 3709. He had finished all of his work on that engine about four hours prior to the accident. Having nothing further to do on it, he had no call or reason to go to that engine or to stand upon or cross over Track No. 8 (Record, p. 71, line 20).

He had also finished all his work on engine No. 3835 and had placed his tools on the inspection wagon ready for removal from the roundhouse. His gang were to stop work at 3 A. M., only a few minutes after the accident (Record, p. 69, line 5 to p. 70, line 25; p. 74, line 1; p. 97, line 30 to p. 98, line 18; p. 105, line 30). Furthermore, he had no work to do on Track 9 (Record, p. 99, line 37).

Siddell, his leader, had not assigned to him any further work after completing engine No. 3835 and he had no more work for him that night (Record, p. 74, line 10).

He had been instructed to wait at the inspection wagon for Siddell's return. That wagon was on the concrete runway, ten feet wide, in front of the engines (Record, p. 72, line 12; p. 101, line 26 to p. 102, line 5).

If he was attempting to leave the premises (which was in violation of his orders), there was no reason for his crossing the tracks at the rear of the engines, because petitioner had provided for him a perfectly safe way of exit along the concrete walk ten feet wide which extended in front of the engines along the entire outer circumference of the roundhouse (Record, p. 102, line 1).

That he was not attempting to do any work is evidenced, not only by the fact that his tools were on the inspection wagon where he himself had doubtless placed them, and no tools were found along the track at the scene of the accident (Record, p. 73, line 1 to line 22; p. 83, line 10; p. 98, line 15 to line 35).

Under the circumstances, it is clear that he had abandoned his employment in interstate commerce; that he was at best a mere licensee at the place where the accident happened; that he had voluntarily entered a place of danger where he was not engaged in performance of any duty owed to petitioner, and where he was outside the protection of the Federal Employers' Liability Act.

In *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, this Court said (p. 306):

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. R. Co.* v. *Behrens*, 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C 163, 10 N. C. C. 153."

To the same effect is *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353.

In *Krysiak* v. *Penn. R. R. Co.*, 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home, chose a dangerous way instead of the safe way provided by his employers. While using that way he was injured.

The Court said (p. 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an employee in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

Tested by the rule laid down in the foregoing cases, at the time of the accident decedent was not engaged in interstate commerce or in any duty pertaining to his employment, and petitioner was not liable for the injury sustained.

POINT III.

Decedent's death was due to his own negligence and his disobedience of orders.

As already pointed out, decedent had finished his work on engine 3709 four hours before the accident. He had finished his work on engine 3835 prior to the accident and had placed his tools on the inspection wagon preparatory to leaving the roundhouse. He had no work to do on Tracks 7, 8 or 9. The latter track was adjacent to the place of the accident. He had been told to wait for Siddell's return at the inspection wagon, which was lo-

cated on the concrete runway in front of the engines (see this brief, pp. 17 and 18). At the inspection wagon where he was told to wait he was perfectly safe. He went to a place of danger where his duty did not require him to go, and there disregarded ample warnings of the impending movement of the engine. He alone was responsible for the accident resulting in his death.

We respectfully submit that for the reasons stated, the writ of certiorari should issue.

ALBERT C. WALL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1923
No. 212

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari
BRIEF FOR PETITIONER

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IN THE

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October Term, 1928
No. 212

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari

BRIEF FOR PETITIONER

This action was brought under the Federal Employers' Liability Act to recover damages for the death of Joseph Marcone, respondent's intestate, an employee of petitioner. He was killed at petitioner's roundhouse at Granton, New Jersey, being run over by the tender of petitioner's engine No. 3709, while that engine was being backed from Stall 8 of the roundhouse to the adjacent turntable, a distance of 68.3 feet (see Ex. D-1 opposite R. p. 120).

On May 7, 1928, respondent recovered judgment against petitioner in the Circuit Court of Hudson County, New Jersey (R. pp. 115-116), and on February 4, 1929, the Court of Errors and Appeals, the Court of Last Resort of that State, affirmed the judgment (R. p. 122) by a divided Court, eight Judges voting to affirm and three to reverse (R. p. 125).

The opinion of the Court of Errors and Appeals (R. p. 120) is reported in New Jersey Advance Reports, Volume 7, No. 7, p. 318, and in 144 Atl. 635. The case has not otherwise been reported.

On February 14, 1929, petitioner's motion for leave to file a petition for rehearing was granted, and the record was ordered held in the Court of Errors and Appeals pending the determination of the application for rehearing.

Notwithstanding the order to hold the record, it was inadvertently remitted to the Circuit Court of Hudson County. Thereupon, on due notice, on March 21, 1929, the Court of Errors and Appeals ordered the Hudson County Circuit Court forthwith to return said record to the Court of Errors and Appeals, to be retained by that Court until its further order (R. p. 123).

By order entered April 19, 1929, the Court of Errors and Appeals denied and dismissed the petition for rehearing (R. p. 123).

On July 1, 1929, petitioner filed its petition herein for a writ of *certiorari* and by order entered October 21, 1929, said petition was granted (R. p. 128).

The Issue

The negligence alleged in the complaint is petitioner's failure to use reasonable care to keep the locomotive No. 3709 under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by reasonable care in time to avoid injury to the intestate of plaintiff; that petitioner did not use reasonable care to equip said locomotive with suitable headlight or any headlight, and did not use reasonable care to propel same at a safe rate of speed (R. p. 1, fol. 2).

The answer denies all allegations of negligence, and, as affirmative defenses, alleges that the injuries sustained by decedent arose out of his negligence in going and standing upon defendant's railroad track at a time when it was unnecessary, improper and obviously dangerous for him so to do; that at the time of the accident decedent was a mere licensee and at said time he was not engaged in interstate commerce (R. p. 2, fol. 3).

In the charge the Trial Court excluded from the consideration of the jury all allegations of petitioner's negligence except the single charge that "defendant did not give warning of the movement of this locomotive" (R. p. 108, fol. 118). The Court also instructed the jury that "if plaintiff recovers, or is entitled to recover, he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive, and that that negligence was the proximate cause of this accident. * * * If he has not made

that out, manifestly he ought not to have a verdict and the verdict should be, under such circumstances, for the defendant" (R. p. 109, fol. 119).

Grounds of Jurisdiction of this Court

1. The Court of Errors and Appeals of New Jersey has decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(a) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(b) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(c) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

2. Among the cases sustaining the jurisdiction of this Court are:

Missouri Pacific R. R. Co. v. *Aeby*, 275 U. S., p. 426;
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165;
Chicago, M. & St. P. R. Co. v. *Coogan*, 271 U. S., p. 472;
Gulf, M. & N. R. Co. v. *Wells*, 275 U. S., p. 455.

Summary of Facts

Plaintiff's intestate belonged to an inspection gang. This gang inspected engines and made minor repairs and adjustments thereto. Siddell was its leader (R. pp. 62-63). After the gang began work, Siddell was in full charge and he alone gave directions to the men (R. p. 93, fols. 100-101).

Decedent had been a member of this night gang for about a year. He had come from a similar day gang (R. p. 65, fol. 70; p. 93, fol. 100). The hours of work were from 7 P. M. to 3 A. M., with an intermission at 11 P. M. for supper (R. p. 93, fol. 101).

Decedent was a box-packer and his work was to pack journal boxes on the engines, removing the old packing and replacing it with new, and when directed by Siddell, to fill grease cups (R. p. 63, fol. 68; p. 65, fols. 70-71). His place of work was confined to the Granton roundhouse (R. p. 66, fol. 71).

At the time of the accident, the procedure with respect to these engines was that after being inspected and as and when needed for service, hostlers backed them out of the roundhouse onto the adjacent turntable (See Ex. D-1 opposite p. 120). There they were turned and taken by the hostlers to a water plug. One witness only testifies to the distance from the turntable to the water plug, and he at one time states the distance to be 300 feet and at another time 300 yards (R. p. 23, fol. 26; p. 88, fol. 94).

The hostlers left the engines at the water plug and there the engine crews took charge of them and put them into the

service to which they had been assigned (R. p. 23, fol. 26; p. 88, fol. 94).

On the night of the accident engine No. 3709 had been inspected and all work on it had been completed before eleven o'clock P. M., or about four hours before the accident. Decedent then had nothing more to do that night on that engine (R. p. 66, fol. 71).

In the usual course of the operations at the roundhouse, hostler McGee, at about 2:30 A. M., backed engine 3709 out of stall No. 8 of the roundhouse over track No. 8 toward the turntable. While so doing, the tender of that engine ran over and killed decedent.

On that night, prior to the accident, decedent had worked on 14 engines, the last one was No. 3835 located on Track 7 (R. p. 63, fol. 68).

At about 2:15 A. M., all the inspection gang, except decedent, had finished their work on engine 3835. Siddell had some work to do outside the roundhouse at a place called "the farm." He told decedent to finish his work on engine 3835 and wait until he (Siddell) returned from the farm (R. pp. 66-67, fol. 72). Siddell then took the other members of the gang and went to the farm. He left the roundhouse about 2:15 and returned about 2:35, or 2:40 (R. p. 64, fol. 69; p. 98, fol. 105).

When Siddell told decedent to wait his return from the farm, that meant he should wait at the inspection wagon where the men congregated at the end of their night's work and prepared to leave the roundhouse (R. p. 94, fol. 101; p. 95, fol. 102).

The tools and supplies of the gang were carried on the inspection wagon which was moved from engine to engine as their work progressed, over a concrete floor about 10 feet wide, which extended in front of the engine stalls around the entire circumference of the roundhouse. Decedent's tools and supplies were carried on this wagon (R. pp. 67-68, fols. 72-73; p. 94, fol. 102).

When Siddell left for the farm and when he returned the inspection wagon was on the concrete floor in front of the engine stalls opposite the open space between tracks 7 and 8 (R. p. 94, fols. 101-102; p. 98, fol. 106). The inner edge of the concrete floor is 82.3 feet from the rear of the engine stalls (Exhibit D-1 opposite page 120).

When Siddell returned from the farm he went to the inspection wagon and began making out his report of the night's work (R. p. 90, fol. 97). Decedent was not there. As soon as Siddell learned of the accident he took a torch and examined engine 3835 to ascertain whether decedent had finished his work. He found decedent's work was all done (R. p. 91, fol. 98; p. 65, fol. 70; p. 68, fol. 74).

Siddell found all of decedent's tools in their proper place on the inspection wagon (R. p. 91, fol. 98). Evidently decedent had placed them there after finishing his work on engine 3835. No one else was there to do this. Siddell had not assigned any work to decedent after he had finished his work on engine 3835. He had no other work for him to do that night (R. p. 68, fol. 74; p. 99, fol. 106).

Between the time Siddell left to go to the farm and his return to the inspection wagon, decedent had nothing to do on track 9 (R. p. 92, fol. 99).

Hostler McGee was called as a witness by plaintiff and on direct examination he described in some detail his movement of this engine (R. pp. 23 to 34). On cross-examination, the witness gives a clearer, more detailed and more connected statement of the movement of the engine in which the sequence of events is much better presented (R. p. 47 to the middle of p. 53; pp. 54-55, fol. 59).

The substance of McGee's testimony is that he came to the roundhouse at about 2:20 a.m.; that he walked to the rear of engine 3709 in stall 8. At that time no one was at the rear of the tender. He then walked along the left hand side of that engine to the front, adjusted the cylinder cocks, passed in front of the engine and walked along its right side to the rear. While on his way, he removed the chains which blocked the main drive wheels. As he did so, he looked to see if there were any obstructions there or anyone working underneath it. He saw no obstructions and no one underneath or around the engine. He looked, but saw no one working on the engine on track 7 or on track 9. He then mounted 3709 on the right side, started the air compressor, turned on the lights, consisting of headlight, cab lights and rear light on the tender, about twelve in all. He then started the bell which was rung continuously by compressed air.

After the air compressor had been operated from 5 to 7 minutes, he blew three blasts of the whistle. *This was the back-up signal, and indicated that the hostler was about to back the engine on to the turntable.* It was then the duty of the turntable operator to set the table. Up to that time the engine had not been moved.

When McGee crossed the turntable on his way to stall 8,

he told the operator he was going to bring out an engine on track 8. The operator was then in the pit, cleaning it out and oiling the rail. He replied that he would be ready when the engine got to the turntable.

McGee blew three blasts of the whistle and started to back the engine out, moving it about four miles per hour. The turntable operator was still in the pit and did not set the table. McGee stopped his engine with the rear of the tender about thirty-five feet from the rear of the engine stall and waited for the operator to set the table. When the table was set, McGee again blew three blasts of the whistle and again started the engine back toward the turntable, again moving it about four miles per hour.

Just before McGee started the engine, and during the entire movement, he was looking backward along the track and saw no one. As he sat in the cab, the tender cut off his view of the track for about twelve feet. He looked for men around the engine, but did not see anyone (R. p. 34, fol. 37; p. 52, fol. 56).

After starting the engine the second time, McGee received a stop signal from the turntable operator. He immediately applied his brakes, got down from the engine and discovered the body of decedent lying on the right side of the tender, the legs and all of the body except the shoulders being on the outside of the right hand rail of track 8, adjacent to track 9. About half of the body was on the turntable (R. p. 30, fols. 33-34; p. 32, fol. 35; p. 76, fol. 82; p. 78, fol. 84).

About an hour after the accident, McGee tried to locate

the place where decedent was hit. He found blood stains about thirty feet from where the body lay, and about thirty-two feet from the rear of the engine stall. He states that the blood stains were between the rails (R. pp. 32-33, fol. 36) and on the right hand rail. They extended about thirty feet from the turntable toward the roundhouse (R. p. 77, fol. 83). He also saw marks along the outside of the right hand rail of track 8, about thirty feet from the turntable. These marks started right opposite the first of the blood spots (R. p. 78, fol. 84).

Siddell, the gang leader, testified that he saw blood stains on the right hand rail, and as nearly as he could remember about fifteen or eighteen feet from the rear end of the engine stall. He saw marks on the outside of the ties as if something had been dragging. These marks were from three to five feet towards the turntable from the place where he saw the blood stains (R. p. 92, fol. 99). He also saw a cap lying inside of the right hand rail of track 8, about five or six feet toward the turntable from the place where he saw the marks (R. pp. 92-93, fol. 100).

Bechtol, an employe at the roundhouse, learned of the accident some time after it happened and went to the turntable. He says he saw the body of decedent underneath the tender, lying on the turntable. The engine was then standing still and he thought it was about three-quarters of the way on the turntable (R. p. 8, fols. 9-10). He removed the body from underneath the tender. Before he removed it, it was lying on the right hand side across the track (R. p. 9, fol. 11). He did not trace any blood stains. He was looking for decedent's lantern but could not find it, but he did locate a cap about fifty feet from the body

and twelve to fifteen feet from the rear of the roundhouse. The cap was between the tracks (R. p. 9, fol. 11).

He did not notice any part of the body outside the rails (R. p. 15, fol. 18). The body "was coming from under the truck toward the center of the tender" (R. p. 17, fol. 20).

Maloy, the turntable operator, set the turntable for engine 3709. He did not set the turntable at the first signal of three blasts of the whistle because he was cleaning out the pit and oiling the rail (R. p. 56, fol. 61).

When McGee blew the second signal of three blasts he was turning the table around (R. p. 57, fol. 62). After setting the table, he gave the signal to back up. He was watching the engine as it came back and noticed something dragging, and gave McGee the stop signal. He looked to see if the engine was off the track. Looking underneath the tender he saw decedent's body (R. pp. 57-58, fols. 62-63).

McGee crossed the turntable to go to stall 8, and as he was crossing he told Maloy he was going to bring the engine out on track 8. He heard the signal of three blasts of the whistle, which was the back-up signal (R. pp. 58-59, fols. 63-64). He also heard the engine bell ringing (R. p. 62, fol. 67). There was a tail light on the tank. When he got out to set the turntable, the rear of the tender was outside the doors of the roundhouse about three feet, and he was standing on the turntable (R. p. 59, fol. 64).

After the engine stopped, he found the body of decedent on the right hand rail of track 8. He locates the position of the body by a cross on the diagram of the engine, Exhibit D-1, between the first and second wheels at the rear of the tender (R. p. 60, fol. 65).

The engine was moving very slowly—"About a nice walk is all" (R. p. 61, fol. 66).

Both McGee and Siddell testified that none of decedent's tools was found along track 8, where the accident happened. They were all in place on the inspection wagon ready for removal from the round house at the end of the eight-hour period which would occur in about 15 minutes (R. p. 77, fol. 83; p. 91, fol. 98).

Errors Relied On

At the close of plaintiff's case, defendant moved for judgment of non-suit, and at the close of the entire case, moved for a directed verdict in its favor. Petitioner contends that the Trial Court erroneously overruled both motions (R. pp. 74-75, fols. 80-81; p. 106, fols. 114-115).

These errors were stated as grounds of appeal in the State Court (R. p. 117).

The motions so overruled were in part based on the following grounds:

1. That at the time of the accident plaintiff's intestate was not engaged in interstate commerce.

2. That no negligence had been established against defendant.

3. That the negligence alleged in the complaint had not been established against defendant.

4. At the time of receiving the injuries resulting in his death, plaintiff's intestate was not acting in the scope of his employment.

5. The injuries resulting in the death of plaintiff's intestate arose out of his negligence.

6. The proximate cause of the death of plaintiff's intestate was his negligence.

7. The injuries resulting in the death of plaintiff's intestate were received at a place where his duties to defendant did not require him to go (R. pp. 74-75; p. 106).

In this Court, petitioner relies on these errors as grounds for reversal.

SUMMARY OF ARGUMENT

1. No negligence was established against the petitioner.

2. At the time of the accident decedent was not engaged in interstate commerce.

3. Decedent's death was due solely to his own negligence and to his disobedience of orders.

POINT I

No negligence was established against petitioner

As to petitioner's negligence, the sole question submitted to the jury was, Did defendant move engine 3709 without warning to decedent (R. p. 108, fol. 118; p. 109, fol. 119)?

The undisputed evidence is that the whistle was sounded and the bell was rung just prior to the starting of the engine, and that the bell was rung by compressed air during the whole movement (R. p. 26, fol. 29; p. 51, fol. 55; p. 62, fol. 67). This conformed to the established system for warning workmen in the roundhouse that an engine was to be moved (R. p. 39, fol. 42).

In its opinion the State Court said:

> "As to the contention that there was no negligence shown, the specific negligence alleged in the complaint, and upon which the Court submitted the case to the jury, was that engine No. 3709 was moved without warning in disregard of a posted notice that it would be moved at three o'clock; that it was actually moved out of the roundhouse between 2:20 and 2:30 o'clock; and that the hour of its movement was posted for the express purpose of apprising the workmen when it would be moved. It seems to have been established that a whistle was blown and the bell was rung on the engine, but the evidence is that this as a warning was inadequate because whistles and bells were sounding 'around there' at all times. The engine backed out of the roundhouse in advance of the time posted with no one on its rear" (R. p. 121, fol. 137).

But the question of the alleged premature moving of the engine, or its movement in disregard of the time stated in a posted notice, is not in this case. Both questions were eliminated by the charge of the Trial Court by limiting the question of defendant's negligence to the single charge that the engine was moved without warning to decedent.

The State Court concedes that the engine whistle was sounded and the bell was rung before the engine was moved, but finds that these warnings were insufficient because "whistles and bells were sounding 'around there' at all times" (R. 121, fol. 137).

We submit that there is no evidence that these warnings were insufficient, and that the Court was not justified in determining that they were. Still less was the Court justified in holding that under the circumstances, backing the engine out of the roundhouse *without a guard on the rear* permitted the jury to charge defendant with negligence.

The operating officials of the Railroad Company are far better qualified to determine what constitutes adequate warning than either witnesses or the Courts. A Railroad Company must be allowed much freedom of choice in the matter of providing safe working places for its employees. This includes establishing a system of signals as a warning of impending movements of its rolling stock. The principle upon which the decisions in *Toledo, St. Louis & Western R. Co.* v. *Allen,* 276 U. S. 165, and *Delaware, Lackawanna & Western R. Co.* v. *Koske,* 279 U. S. 7, are based, are applicable to the giving of warnings in this case.

In *Toledo, St. Louis & Western R. Co.* v. *Allen,* plaintiff was employed by the Railroad Company as a car checker. He was obliged to perform his duties in a freight yard where switching was going on.

At the time of the accident, he was checking a string of cars on track 5 and was between that track and track 4. A switching crew sent two cars by a flying switch along track

4 to the place where plaintiff was struck. The Trial Court permitted the jury to find defendant guilty of negligence if the space between tracks 4 and 5 was found to be so narrow that when track 5 was occupied, plaintiff was in danger of being struck by cars moving on track 4.

This Court said (p. 170):

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries."

In *Delaware, Lackawanna & Western R. Co.* v. *Koske*, plaintiff was injured by jumping from a switch engine. He landed in a shallow open ditch or trench which drained a part of defendant's yard, the ditch or depression being in depth from 8 to 11 inches and in width from 8 to 24 inches. This ditch being uncovered, it was charged that the place of work provided for the plaintiff was not reasonably safe.

This Court said (p. 236):

> "There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defen-

dant or other carriers any means for the draining of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries. *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165."

Had decedent been entitled to warnings in addition to the ringing of the bell and the blowing of the whistle (which we deny), the evidence discloses other warnings which were ample to notify him that the engine was about to be moved.

When the hostler, McGee, boarded the engine, he set the air compressor pump going immediately, and it continued to operate until he left the engine after the accident. The compressor made a noise which could be heard at least 30 or 40 feet. He next turned on the head light, cab lights and rear light on the tender, about 12 in number, thus lighting up the whole engine. He waited until he got 50 pounds air pressure before moving the engine. That took from 5 to 7 minutes, and he was on the engine 10 minutes with the compressor going and lights on before he moved it (R. pp. 26-27, fols. 29-30; pp. 50-51, fols. 54-55). The rear light on the tender was a big light (R. p. 34, fol. 37; p. 62, fol. 67).

The engine lights are not turned on and the air compressor is not started by the hostler until he is about to move the engine (R. p. 51, fol. 55).

Decedent must have been close to the engine before it started. Everything about it—compressor pump, bell, whistle, lights, the hostler on board—all were plain indications that the engine was about to be moved. In the absence of the hostler, the compressor would not be working nor would the lights be on (R. p. 51, fol. 55).

Being close to this engine, decedent could not have been confused as to the source of the signals by bell and whistle, or as to their well known meaning that the engine was about to be moved. Furthermore, there is no evidence that whistles were sounded or bells ringing on any nearby engines at that time, certainly none were sounding or ringing on engines on track 7 or 9 as no work was then being done on either, and no workmen were near either.

As already pointed out, whether the engine was prematurely moved or not was eliminated from the case by the charge of the Court. Had it been in the case the evidence does not sustain the conclusion of the Court below that the posted notice with respect to the movement of the engine *fixed the time for its movement out of the roundhouse at 3 o'clock.* The evidence with respect to the time posted on the blackboard is uncontradicted, and is to the effect that the time there posted was the time when the engine crew were to take possession of the engine at the water plug, and not when the hostler was to back it out of the roundhouse. The time thus posted, therefore, could not have been any guide to the men working in the roundhouse as to the time when the hostler would back the engine on to the turntable.

The witness Weiss was first asked when the engine *would leave the roundhouse,* and before that question was

answered, the form was changed and he was asked if the record he produced showed when the engine was to be taken out of the roundhouse. Evidently having in mind the unanswered question, he replied, "Three o'clock in the morning" (R. p. 20, fol. 23). Later he explained that the time shown by the records he produced and testified from was the time when the engine crew were ordered to depart with the engine from the engine house; that his records showed that time to be three o'clock A.M.; that he had no record of the time it was to be backed out of the roundhouse—that his records had nothing to do with the movement of the engine out of the roundhouse on to the turntable (R. pp. 22-23, fol. 25).

The turntable is a part of the roundhouse. It is therefore quite true that the engine was to be *ready to leave the roundhouse in charge of the engine crew* at 3 o'clock A. M.

Kelly, the Assistant Foreman of the Roundhouse, also testified that the time posted on the blackboard was the time the engine was scheduled to leave the yard, not when it was to be taken out of the roundhouse (R. pp. 42-43, fol. 46).

McGee, the hostler, testified that "the crew was supposed to get on the engine at three o'clock," meaning the engine crew (R. pp. 80-81, fol. 87).

The engine was not prematurely moved from the engine stall, but was moved at the usual and customary time (R. p. 100, fols. 107-108).

It was customary to back an engine out of the roundhouse to the turntable a half hour or an hour before it was scheduled to leave in the custody of the engine crew (R. p. 100, fol. 108).

The directions to hostlers not to take the engines out of the roundhouse too early was to avoid congestion at the water plug, where the engines were taken in charge by the engine crews, and had no relation whatever to the time when they were to be moved out of the roundhouse (R. p. 46, fol. 49).

No one acting for defendant knew or had reason to suppose that decedent was in a place of danger when the engine was moved; hence, there was no duty to give him any special warning or to exercise any special care for his protection, such as placing a guard on the rear of the tender, as suggested in the opinion of the State Court.

In *Chesapeake & Ohio R. R. Co.* v. *Mihas,* 50 Sup. Ct. Rep. 42, Mihas cared for switch lights along the railroad right of way. While crossing the tracks to get his speed car which he used in his work, he climbed over a coal car standing with others on a switch. While doing so, other cars moving in a flying switch were driven against the standing cars and he was injured.

The negligence complained of, among other things, was that contrary to custom, this switching movement was performed without warning. It appeared, however, that the warning customarily given was for the protection of persons unloading standing cars and that no duty of warning was owed to plaintiff when crossing the tracks.

This Court said (p. 95):

> "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge

> or ground for belief, they were not required to warn him of the impending switching operation or to take other steps to protect him. *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, 173, 72 L. ed. 513, 517, 48 Sup. Ct. Rep. 215."

The judgment cannot be sustained on a theory different from that on which it was submitted by the Trial Court to the jury. The charge of that Court having limited petitioner's negligence to the failure to give decedent warning of the impending movement of the engine, the judgment cannot be sustained upon the theory that the engine was prematurely moved.

> *Delaware, Lackawanna & Western R. Co.* v. *Koske,* 279 U. S. 7.

Not only were adequate warnings given to decedent but within about ten minutes before the engine was moved, careful observations were made all around and underneath the engine to ascertain whether any workmen were around it or whether any work was being done on it.

McGee approached the engine from the rear as it stood in the engine stall, passed along the left side adjacent to track 7 to the front of the engine, crossed to the right side, walked down that side to the rear, removed the chains blocking the drive wheels, looked underneath the engine, walked to the rear on the right side and then returned to the cab. No one was working on engine 3709 (R. pp. 47-50, fols. 51-55), or on the engines standing on tracks 7 and 9 (R. p. 25, fols. 27-28; pp. 54-55, fol. 59; p. 89, fols. 95-96).

After this inspection, McGee entered the engine cab, turned on the lights and set the air pump in motion. He

was on the engine about ten minutes before starting to back it out. During the entire movement he was looking backward towards the turntable and saw no one (R. p. 34, fol. 37; p. 52, fol. 56). Evidently decedent came into a position of danger after McGee had entered the engine cab. After he had entered the cab, everything about the engine clearly indicated that it was soon to be moved.

Petitioner had performed every duty which it owed to decedent.

There was no eye witness to the accident. No one saw or knows how decedent came to be struck or how or why he came to the place of the accident. Evidently he was struck on the right side of the engine, adjacent to track 9, and at or close to the rear of the tender. How or why he came there does not appear. How the accident happened no one knows. This whole matter is left in the realm of speculation and conjecture. This is insufficient to sustain the judgment.

> *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan*, 271 U. S. 472 (at p. 478), and cases cited.

When circumstantial evidence is relied upon, the circumstances must be proved, they cannot be presumed. *Manning* v. *John Hancock Mutual Life Insurance Co.*, 100 U. S. at p. 697; *Chicago, etc. R. R. Co.* v. *Coogan*, 271 U. S. at page 477; *Price* v. *New York Central R. R. Co.*, 92 N. J. L., at p. 432.

In *McCombe* v. *Public Service Railway Co.*, 95 N. J. L. p. 187 (New Jersey Court of Errors and Appeals), action was brought to recover for the death of plaintiff's intestate

whose body was found near midnight lying on defendant's track, badly mutilated. There were no eye witnesses to the accident. No one saw how it happened. The Court said (p. 189):

> "But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price* v. *New York Central R. R. Co.*, 92 *id.* (N. J. L.) 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

In *Adriance* v. *Palisade Realty and Amusement Company et als.*, 95 N. J. Law 185 (N. J. Court of Errors and Appeals), plaintiff was riding with two companions in a racer operated by defendant. Toward the end of the second ride something happened and plaintiff ceased to remember anything. A few minutes before the accident, one of plaintiff's companions had spoken to him. The next he saw was that "plaintiff was doubled up, bleeding." No one saw what caused his injury.

The Court said (p. 186):

> "The facts disclose an injury which is admitted, but do not disclose how it happened and no one gave any testimony on the point."

In *Alvino* v. *Public Service Railway Co.*, 97 N. J. L., p. 526 (N. J. Court of Errors and Appeals), suit was brought to recover for the death of plaintiff's intestate arising out of a collision between a motorcycle and defendant's trolley

car. No one testified to having seen or heard any collision. Decedent's wife testified that she saw him riding in the side car of a motorcycle. A witness who lived about one hundred feet from the place of the accident saw a motorcycle being driven along the Avenue and the next thing she heard was the shaking of the house and a grinding noise. Then she saw the dust and after that passed she saw the motorcycle and went out and saw the car. Another witness saw two men lying unconscious on the roadside and the motorcycle was broken.

The Court said (p. 529):

> "It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car; but, if so, how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

In *Patton* v. *Public Service Railway Co.*, 227 Fed. 810 (C. C. A., Third Circuit), decedent was found dead under the rear truck of a car on the Company's northbound track. The car had backed from a position north of the station toward a switch south of the station. The conductor was on the rear platform and was able to see a certain distance down the track, but saw no one. The car was lighted within and carried the customary forward and rear lights. The conductor felt a jolt, stopped the car and discovered decedent's body underneath it. The rear truck was off the track.

The negligence charged was that defendant's servants "backed the car at a reckless speed, without giving sufficient warning, and failed to exercise the care which the law requires of a carrier toward a passenger."

The Trial Court and the Court of Appeals assumed that decedent had been a passenger and that he remained such at the time of his death, and decided the case on the question of defendant's negligence.

On this point the Court said (p. 812):

> "No one saw the accident and no one knows, as a matter of fact, how it happened. The plaintiff contends that from the circumstances of the accident, negligence of the defendant must be inferred, that is, had the defendant not been negligent, the accident would not have occurred. When or how the plaintiff's husband got upon the track between the two rails is not disclosed. Whether he heard the bell ordering the car to back or whether he saw the lighted car in time to avoid his peril, is not shown. Whether the car knocked him down, or whether he fell down and while in the forward position in which his body was found, was run over by the car, is a mystery. * * * In fact, it is not shown how the accident occurred. * * * The learned trial judge was entirely without error in withdrawing from the jury a case in which a verdict for the plaintiff could not have been sustained by the evidence."

This case is brought under the Federal Employers' Liability Act and is governed by that Act and by the principles of the common law as applied in the Federal Courts.

> *Missouri Pacific R. R. Co.* v. *Aeby*, 275 U. S., p. 426 (at p. 429);
> *Toledo, St. Louis & Western R. Co.* v. *Allen*, 276 U. S., p. 165 (at bottom p. 169).

This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain

a finding that petitioner's negligence was the cause of death, the judgment of the State Court will be reversed.

Chicago, Milwaukee & St. Paul R. Co. v. *Coogan*, 271 U. S. 472 (at p. 474).

Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a non-suit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. v. *Groeger*, 266 U. S., p. 521;
Gulf M. & N. R. Co. v. *Wells*, 275 U. S. p. 455;
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165;
Western & Atl. R. Co. v. *Hughes, Admx.*, 278 U. S. 496.

Not only did respondent fail to establish any negligence against petitioner, but the evidence clearly disproves any negligence on its part.

In *Atlantic Coast Line R. R. Co.* v. *Driggers, as Admx., etc.* (decided by this Court June 3, 1929), 73 L. Ed. (Advance Opinions), p. 556, decedent was a member of a switching crew who were moving cars in a southerly direction from a siding onto the main northbound track of defendant. As the train came out onto the main northbound track decedent was riding on the front foot board of the engine and was facing south. As the engine approached the switch and moved southerly on to the north bound track, a passenger train approached on the adjoining south bound track. De-

cedent could not see this train without turning and looking back. He jumped from the engine, landing between the tracks and was killed by the passenger train.

It was not necessary at that time for decedent to leave the engine.

This Court held that the Railroad Company was not liable and said (p. 558):

> "Under these circumstances, it is clear that Driggers, by his own negligence, as the sole and direct cause of the accident, brought on his own death, and that there is no ground upon which the liability of the railroad company may be predicated. Compare *Atlantic Coast Line R. Co.* v. *Davis, supra* (279 U. S. p. 39, 49 Sup. Ct. Rep. 210); and cases cited."

POINT II

At the time of the accident decedent was not engaged in interstate commerce.

Under the Federal Employers' Liability Act, the question whether decedent was engaged in interstate commerce is to be determined by the nature of the work being done at the time of the accident.

Illinois Central R. R. Co. v. *Behrens,* 233 U. S. 473;
Erie R. R. Co. v. *Welsh,* 242 U. S. 303.

At the time of the accident, decedent was not engaged in any work. He was struck on the right hand side of

Track 8, adjacent to Track 9, probably at a distance of at least 15 feet from the rear of the engine stall. This point was distant about 100 feet from the inspection wagon located on the concrete floor in front of the engine stalls where, after completing his work on engine 3835, he had been directed to await the return of Siddell. His work on Engine 3709 had been completed at least four hours before the accident, and after completing his work on Engine 3835 he had nothing further to do on any engine unless Siddell gave him further orders, and none were given. Siddell had nothing further for him to do, that night (R. p. 99, fol. 106).

All his tools were on the inspection wagon ready for removal from the roundhouse at the end of his night's work, and no tools of any kind were found along tracks 7, 8 or 9 (R. p. 91, fol. 98).

At the time and place of the accident it is clear that he was neither engaged in interstate commerce nor within the scope of his employment. Under such circumstances, plaintiff had no right of recovery.

In *Harbor* v. *Jenkins Rubber Co.*, 72 N. J. L. 171, plaintiff was returning to his place of work after noon recess. He was proceeding along a proper pathway on the employer's premises when his attention was called to a glittering object, and he departed from that pathway by a distance of about 50 feet to pick it up. While off the pathway he was injured. The Court said:

> "He was therefore neither working for the defendant company at the time nor proceeding to the place where he was to work with the intention of resuming work. When he deviated from the path,

> the use of which it might possibly be considered he was invited to make, he lost the protection of such implied invitation and became either a trespasser, or, at the most, a mere licensee, to whom the defendant company owed no duty except to abstain from willful injury."

The judgment of nonsuit was affirmed.

In *Harris* v. *U. S. S. Co.*, 75 N. J. Law 861, plaintiff's decedent, a longshoreman, was assisting in unloading a vessel. While thus employed, it became necessary for him to have a shovel and he called to a co-employee, whose duty it was to supply tools for the longshoremen, to provide a shovel. Without waiting for the shovel to be brought, decedent left his place of work to procure a shovel for himself and while doing so fell into a coal hole and was killed. The Court said (at page 864):

> "When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the defendant knew or ought to have known."

There being no proof of such a custom, a judgment in favor of the plaintiff was reversed.

If decedent was attempting to leave the roundhouse, assuming that he might properly do so before Siddell's return (which was not the fact), he had a perfectly safe

course along the concrete floor in front of the engine stalls which was ten feet wide. Instead of using that way, he voluntarily chose a dangerous way and was struck in a position at the rear of the tender of engine 3709, where he had no reason or right to go.

In *Krysiak* v. *Penn. R. R. Co.*, 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home chose a dangerous way leading across the company's tracks, instead of the safe way provided by his employer. While using that way he was injured.

The Court said (page 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an employe in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

To the same effect is *Atlantic Coast Line R. Co.* v. *Davis, Adm.*, 279 U. S. 34. In that case decedent at first took a perfectly safe position in which to give signals for spotting cars. He then voluntarily took a dangerous position and while there was killed. This Court said that he "thereby through his own negligence, as the sole and direct cause of the accident, brought on his own death."

POINT III

Decedent's death was due solely to his negligence and to his disobedience of orders.

Contrary to Siddell's direction, decedent voluntarily left a place of safety at the inspection wagon and went to a place of danger around the rear of engine 3709, about 100 feet from where he had been told to remain, and where his duty to petitioner did not require him to go. Under those circumstances, petitioner owed him no duty except to refrain from wilfully injuring him.

In *Great Northern Ry. Co.* v. *Wiles, as Admr.*, 240 U. S. 444, decedent was a rear brakeman on a freight train. The drawhead pulled out of one of the cars and this caused the train to stop. Shortly afterwards, it was run into by a following express train and decedent was killed.

When the train broke in two, it was the duty of decedent immediately to go back and protect the train and the engineer gave the usual signal for him to do so. He failed to protect the train and the collision resulted.

This Court held that by reason of his failure to regard the signals of the engineer and to perform his duty, there could be no recovery, even though negligence could be imputed to the carrier from the pulling out of the draw bar.

In *Frese* v. *C. B. & Q. R. Co.*, 263 U. S. 1, decedent was an engineer in the employ of the Railroad Company. Under a statute of the State of Illinois he was required on approaching a grade crossing of railroads to bring his train

to a full stop before reaching the crossing and to ascertain positively that his train could safely resume its course before proceeding over the crossing. He brought his train to a stop but did not ascertain that he could safely proceed over the crossing. His engine was struck by a train approaching on the other railroad and he was killed.

This Court held that there could be no recovery, even though the train approached from the fireman's side and if the fireman had kept a proper lookout he would have seen the colliding train. The negligence of the fireman, if any, did not excuse the negligence of the engineer.

In *Davis* v. *Kennedy,* 266 U. S. 147, decedent was a locomotive engineer and it was his duty to ascertain definitely at a station known as Shops that train No. 1, approaching on a single track road, had passed that station. The conductor had asked him to look out for that train and decedent agreed to do so. Without ascertaining whether No. 1 had passed Shops, he ran his train beyond that station and the collision occurred.

This Court said (p. 148):

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required, on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

To the same effect is *Unadilla Valley R. Co.* v. *Caldine, Admr.,* 278 U. S. 139.

In *Mehl* v. *Glucose Co.*, 83 N. J. Law, page 630, the Court said (at page 631):

> "When an employer forbids his employee to do a certain act in connection with the machine on which he is working, and the employee while violating such prohibition, and as a result therefrom, receives injury, the employer is not liable. *Card* v. *Wilkins*, 32 Vroom 296."

We respectfully submit that the judgment should be reversed.

ALBERT C. WALL,

WILLIAM H. CAREY,
Counsel for Petitioner.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1929

No. 212

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari
REPLY BRIEF FOR PETITIONER

ALBERT C. WALL,
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IN THE

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Petitioner,

against

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari

REPLY BRIEF FOR PETITIONER

On page 2 of respondent's brief it is asserted that the only warning decedent had to rely on with respect to the time the engine would be moved, was the time marked on the blackboard, which was 3 A. M. This statement is repeated in substance on pages 3 and 5. But it is clearly proved that the time posted on the blackboard was not the time for backing the engine from the engine stall, but was the time the engine was to be taken from the vicinity of the water plug by the road engine crew (R., pp. 22-23, fol. 25; pp. 42-43, fol. 46; pp. 80-81, fol. 87).

On page 4 of respondent's brief it is stated that blood stains were on the right-hand side of the rail of track No. 8, *adjacent to the track on which decedent was working.* This language is ambiguous, and might be construed to mean that the blood stains were on the right side of the rail next to track No. 7. The fact is that the body of decedent was found lying partly on the right-hand rail of track No. 8 adjacent to track No. 9, and partly outside of that rail, and the blood stains were on and near that rail as were the marks indicating that something had been dragged along that rail (R., p. 30, fol. 34; p. 32, fol. 35; p. 60, fol. 65; p. 76, fol. 82; p. 77, fols. 83-84; p. 92, fol. 99).

On page 4 of respondent's brief it is stated that the clearance between tanks standing on track No 7 and track No. 8 was about two feet. This is a mere estimate by McGee, the hostler (R., p. 83, fol. 90). He had never measured the clearance (R., p. 88, fol. 95). The clearance, as shown by the measurement of Gordon, the engineer, was about 3 feet 9½ inches (R., p. 104, fol. 113).

The clearance between tracks is an engineering problem which is not to be left to the uncertain opinions of juries.

Baltimore and Ohio R. Co. v. *Groeger,* 266 U. S. 521;
Toledo, St. Louis & Western R. Co. v. *Allen,* 276 U. S. 165.

On page 11 of respondent's brief it is admitted that no one saw what decedent was doing when he was injured, and this, it is argued, made it a question for the jury to determine what he was doing at that time.

There is no evidence in the case, either direct or circumstantial, to enable the jury to determine what decedent was then doing. All the circumstances indicate that he was doing nothing in connection with his employment. Four hours before the accident he had finished his work on engine 3709 which struck him. He had completed his work on engine 3835 and had placed his tools and supplies on the inspection wagon. There was nothing in connection with his employment which required him to go to the right-hand side of track 8 where he was struck, a distance of over 80 feet from the inspection wagon, where he was to remain until the foreman returned from "the farm."

On page 10 of respondent's brief it is stated that it was admitted that engine No. 3835 was an engine engaged in interstate commerce referring to record, top of page 96. At the top of that page the record states that Mr. Simpson said:

> "It is admitted, your Honor, that this engine 3835 pulls a train into New York State."

From this statement it is not proper to draw an inference that engine 3835 was assigned to, or was presently to begin an interstate trip. That this engine may have made an interstate trip before being placed in the roundhouse and that when next put in service, it went on an interstate trip, is insufficient to establish that it was engaged in interstate transportation at the time decedent was working on it.

In *Illonardo* v. *Erie R. R. Co.*, 135 Atl. 77 (cited on page 10 of respondent's brief), plaintiff was injured at a roundhouse used by defendant in interstate and intrastate commerce. A crippled engine was brought to the roundhouse

for repairs and plaintiff was called upon to assist in opening one of the doors to admit the engine. While thus employed and before the door was entirely open, the engine was started up without warning, crashed into the door, and injured plaintiff. It was held that plaintiff was engaged in interstate commerce.

It is at least open to question whether this Court would have sustained that judgment if it had been brought here for review.

In *Manziano* v. *P. S. Gas Co.*, 92 N. J. L. 322 (cited on page 14 of respondent's brief), plaintiff was found dead in a trench which he had been employed to guard, and had been guarding during the night. The trenches had been dug by defendant in an effort to locate leaks in a gas main. The odor of gas could be detected half a block distant. The volume of escaping gas made standing upon the embankment of the trenches dangerous to employees. Workmen could not work in the trenches for more than four or five minutes and they worked in relays. Maintenance of life in the trenches was impossible for more than six minutes. Decedent was instructed to guard the trenches and to keep four guard lights burning upon the embankments.

Decedent was last seen near the trenches at a little after 4 A. M., and was not seen again until his body was found in the trench about 6 A. M. One of the planks forming the barricade around the trenches was down, and one of the lamps broken and extinguished on its side on the embankment. The cause of this disorder was not shown by the evidence.

The Court held that these circumstances were sufficient to warrant a finding that the cause of death was an accident which arose out of and in the course of decedent's employment.

On page 15 of respondent's brief are cited the cases of *DeFazio* v. *Goldschmidt Co.*, 87 N. J. L. 317; *Bryant* v. *Fissell*, 84 N. J. L. 72; *Musik* v. *Erie R. R. Co.*, 85 N. J. L. 129.

These are all compensation cases under the State Statute.

In *DeFazio* v. *Goldschmidt Co.*, decedent was found dead lying near a train of cars with a hole about 6 inches in diameter in his abdomen. The proof was that he had gone to his foreman in search of material and while on this trip was injured. The Court held the evidence was sufficient to establish the fact that his injuries were received from an accident arising out of and in the course of his employment.

In *Bryant* v. *Fissell*, decedent, while engaged as a carpenter, was injured by a heavy bar falling from an upper story of a building in course of construction. This also was held to be an accident arising out of and in the course of decedent's employment.

In *Muzik* v. *Erie R. R. Co.*, decedent had delivered waybills to a train agent, and after the train had passed on, he was found dead within three or four feet from the track with an injury to his head. These facts were held sufficient to warrant a finding that he had been struck by the train in the course of his employment.

These cases do not support the contention of respondent that the evidence in this case was sufficient to warrant a finding that at the time of the accident decedent was engaged in interstate commerce, or was acting within the course of his employment.

We respectfully submit that the judgment should be reversed.

ALBERT C. WALL,
WILLIAM H. CAREY,
Counsel for Petitioner.

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IN THE

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OCTOBER TERM, 1929.

No. 212.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as administrator of the Estate of Joseph Marcone, deceased,
Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

It is respectfully submitted, at the outset, that the questions in dispute were not questions to be decided by the Court but were jury questions. While the jury might have drawn the conclusions urged by the petitioner, yet they were not compelled to draw them and this argument is submitted on the theory that the jury could have drawn the conclusions making for liability.

POINT 1.

Negligence established against petitioner.

The testimony adduced by the respondent showed that the decedent was twenty-four (24) years of age (R., p. 71)

and was employed by the petitioner in its roundhouse at Granton, New Durham, New Jersey, as a box packer of journal boxes on engines and a filler of grease cups (R., p. 10). In doing this work of packing boxes, he would go to the different engines on the tracks throughout the roundhouse, and, in fact, he would do whatever work he was told to do by his foreman (R., pp. 37-38).

On the night preceding his death, the decedent had worked on fourteen different engines, among which was engine #3709, which was the engine that caused his death. At about 2:15 A. M., the decedent's foreman had instructed the deceased to work on engine #3835, which engine was on track #7 or adjacent to track #8 on which engine #3709 was being propelled (R., p. 65). His foreman was the last man to have seen the deceased alive, for he was not seen by any one after 2:15 A. M. The instruction given to the decedent was that he was not to leave engine #3835 until his foreman had returned from the farm (R., p. 67). The foreman did not see the deceased again until he was dead (R., p. 65). The decedent was killed by engine #3709, which was on the track next to the one on which the engine was upon which the deceased was working.

The jury might have found the following facts concerning the deceased's death:

There was no warning of the intention to move engine #3709 while the deceased was working in proximity thereto on engine #3835; that the only warning that decedent had to rely on was a blackboard in the roundhouse on which there was marked the time, 3:00 A. M., that engine #3709, which killed him, would be moved, and that the said engine instead of being moved at that time was moved at 2:30 A. M. without any proper warning.

There was a custom of warning the men in the roundhouse of the movement of these engines by writing on

the blackboard the time when these engines would be moved, and the men would govern themselves accordingly (R., pp. 36-104). This system or custom of writing on the blackboard was in vogue during the entire time that the foreman and the decedent were employed at the roundhouse, and this system was still in vogue at the time of the accident (R., p. 46).

There was some testimony that the hostler blew his whistle and rang the bell twice before the engine was moved. When he blew his whistle and rang the bell on the first occasion, the turn table man did not hear them as he was in the pit not expecting the engine out at that time as the notation on the blackboard stated that the engine would not be moved until 3:00 A. M. There was also testimony that all kinds of whistles are blown in the roundhouse, and that you do not know what they mean. It may be that a man is testing the bell and that it did not mean the intended movement of a train (R., p. 13). This also applied as far as blowing of the whistle was concerned (R., p. 14). The hostler was told by the assistant foreman that he should not take the engine out too early, but notwithstanding this warning, the hostler took the engine out five (5) minutes after he was told not to do so (R., p. 39).

The hostler had worked as such for three (3) months, and his duty as a hostler was to bring the engines out of the roundhouse for crews to take them away (R., p. 23). He would take the engine from the roundhouse to the water plug near the master mechanic's office, which is about 300 feet away (R., p. 23). The engine that caused the accident was on track #8 and there were engines on both sides of it, one of the engines had steam and the other was dead (R., p. 25). He got on his engine at about 2:20 A. M., but did not start the engine until 2:30 A. M. (R., p. 27). The engine had travelled a distance of about 35 feet from the roundhouse, that is 35

feet from the rear of the engine, as he was backing out at the time (R., p. 28) when he was stopped by the turn table man. However, he travelled about 60 feet before he came to a standstill (R., p. 28). Although the hostler testified that he looked as he was proceeding with his engine, and there was nothing to prevent him from seeing anyone working on the other engines, yet he said that he saw no one (R., pp. 28-29).

Although the hostler knew that bells were ringing and whistles were blowing all the time, and although he knew that there was a live engine right along his right-hand side, he did not give any warning to anybody that he was going to move the engine, notwithstanding that it was being moved before its schedule time (R., pp. 29-30).

Blood stains were found on the right-hand side of the rail of track #8 adjacent to the track on which the deceased was working. The blood stains went for a distance of about 30 feet from where the body was found, and the body was found about 60 feet from the end of the stall (R., p. 33). There were marks as if something dragged along that rail beginning at a point where the blood stains were found.

Although the hostler testified that his bright light was sufficiently bright to see anyone who might be behind him, yet he did not see the deceased (R., p. 34).

There was a clearance of about 2 feet between the tank of the engine which caused the accident and the tank of the engine on the nearby track on which the decedent was working (R., p. 83).

From all the foregoing evidence, the jury would be justified in finding the following facts:

That the deceased was working on an engine when he was killed; that he was killed because the engine next to the one on which he was working was moved out of the roundhouse, without any warning to him, at a time

other than that on the blackboard which, by reason of the custom of the roundhouse, he had a right to rely on; that the hostler of the engine that killed him made a careless inspection because he was unaware of the presence of the deceased near the moving engine, although it would have been disclosed by a careful inspection; that the deceased was struck by an overhanging moving engine, being close to same, believing that it was stationary at the time it was moved.

The petitioner in its brief says that the hostler made a careful observation—that is simply begging the question. If the decedent was working near the engine that was being moved and the hostler did not see him, the jury could have found that it was not a careful but a careless observation.

The testimony seems to indicate that a whistle was blown and the bell rung on the engine by the hostler, but the evidence is clear that this as a warning was inadequate because everyone testified that the whistles and bells were sounding "all around there" at all times and that the men did not know what they meant (R., p. 13). The men could have relied on the custom in vogue there of placing on the blackboard the time of the moving of the engines. In view of the premature movement of the engine in a backward position, at a time when the deceased had reasonable ground to believe that it would not be moved, and, for that reason, some other notice of precaution should have been taken to warn the decedent, the jury was justified, and it was a question for the jury, that the petitioner had not performed his full duty to the deceased.

As the Court below said, that in view of the moving of the engine before its scheduled time and in view of the fact that the blowing of the whistles and bells meant nothing in the roundhouse, it should have had a guard on the rear end of the engine or some other measure of warning the deceased.

In the case of Illanardo vs. Erie R. R., 135 Atl., 77, affirmed in 137 Atl., 917, Chief Justice Gummere, speaking for the Supreme Court, said:

> "The question for the consideration of the jury in the present case was whether the engineer knew that the plaintiff was opening the roundhouse door and if so, then whether he ought not to have used care to ascertain whether, by running this engine into the roundhouse, before the door thereof was entirely opened, he would thereby jeopardize the safety of the plaintiff and, if that fact was apparent then it was for the jury to say whether he was not under a duty to give notice to the plaintiff of his intended movement of the engine either by the blowing of the whistle or the ringing of the bell (although neither of these things was done under normal conditions) or by taking some other precaution for his protection against injury which might otherwise result to him."

In the case of Southern Rwy. vs. McGuin, 240 Fed., 649, the Court there held:

> "Running a north bound train upon the south bound track is not negligence, but it imposes on the railroad company great precautions to warn employees of the approach of the train, since it must take notice that the employee will be somewhat less on guard against the train coming from that direction."

This answers the petitioner's criticism of the Court below when it stated that it should have had a guard on the rear of the engine inasmuch as the engine was prematurely moved, and the giving of the whistles and bells meant nothing.

The petitioner argues as if the custom of putting the time on the blackboard of the movement of the engine did not mean anything, although the testimony is clear that the men were governed by this blackboard.

In the case of Firth vs. P. R. R., 83 N. J. L., 467, Justice Garrison, speaking for the Court of Errors and Appeals, said:

> "The place of work of a servant was a pit under a locomotive tender, which was a reasonably safe place unless the tender was moved without warning. There was a custom of giving such a warning, but whether it was given as an incident of the work of the master or as the duty of the master to warn the servant was a disputed question. That where the testimony was conflicting and variant inferences could be drawn from it, this question was for the jury."

When an employer makes a rule for the protection of the employees, he admits the reasonable necessity for the conduct thereby prescribed, and a violation of the rule can be found to be negligence, and the master cannot assert that the rule is not necessary.

See Topere vs. Boston & M. R. R., 103 Atl., 72, volume 45 of the U. S. Code Annotated, page 194.

All the cases cited by the petitioner have no bearing on our case at all. In McCombe vs. P. S., 95 N. J. L., 187, there is nothing but the circumstance of the body of Saunders under the car.

In the Adriance case, 95 New Jersey Law, 185, nobody knows or could surmise from the evidence what happened.

In the case of Price vs. N. Y. C. R. R., 92 L., 429, citation taken from the first trial of the Price case, there was no proof of any fact exclusive of presumption.

In Patton vs. P. S., 227 Fed., 810, it was a case of a pedestrian without any violation of any duty by the defendant.

In the case sub judice, the facts showed that the decedent was working on the premises of the petitioner, at a place to which he had been assigned, working adjacent to the track on which the engine that killed him was propelled; we have the blood stains on the side and rail of track #8 near the track on which decedent was working; we have the marks as if something was dragged along the same rail at a point where the blood stains were found; we have the violation of a duty by the premature movement of the engine other than that on the blackboard, and the blowing of whistles and bells, which meant nothing because they were being blown continuously and "all around" the roundhouse.

From all of the facts, it was a question for the jury to decide as to the negligence of the petitioner and it was not a court question.

POINT 2.

Decedent engaged in interstate commerce.

The petitioner in its answer admits that it was engaged in interstate commerce at all times mentioned in the complaint but denies that the respondent, at the time of the accident, was engaged in interstate commerce, on the theory that the decedent was not engaged in any work at the time of his death, although the testimony is clear that the decedent was last seen alive at 2:15 A. M. by his foreman who instructed him to work on engine #3835; that the decedent's tour of duty did not end until 3:00 A. M., and he had been instructed to finish his work on this engine and not to leave until his foreman had returned from the farm, and to await further orders, although the foreman did not know whether there was any further work to be done that morning by the decedent (R., p. 68).

The decedent's death took place at about 2:30 A. M. or 2:40 A. M. and at that time, decedent was within the roundhouse on the premises of the petitioner.

It was a question of fact for the jury, under the circumstances, as to whether or not he had finished his work on this engine. How long before his death he had finished his work, no one knows. It may have been a minute or two minutes, or it may have been that he was looking over his work, which he had finished, to see if it had been properly done, awaiting the return of his foreman.

If he packed interstate engines with grease, and the testimony here warrants the inference that there were no other engines than interstate engines in this roundhouse, then he was engaged in interstate commerce as a matter of law, but upon the facts, at best, it was a jury question.

The petitioner practically concedes that the decedent's work was that of interstate commerce, but its whole theory is that he was engaged in neither interstate nor intrastate commerce because he had finished his work and was at a place where he should not have been. It was a question of fact for the jury as to whether he was engaged in interstate commerce and that, of course, depends upon what he was doing at the time of his death. The only testimony we have is that of the foreman who testified that he instructed the decedent to work on engine #3835, and finish his work on said engine, and await further instructions from him. He was last seen alive by his foreman at 2:15 A. M., when he was given his instructions to finish this engine, so at that time he was not through with his work, but had just began working on said engine.

The mere fact that the foreman testified that, when he went back to examine engine #3835 on which the decedent had been working, all the work on said engine had been completed, still it was a question of fact for

the jury to say whether or not at the time the decedent met his death, he had completed his work, for the jury might have found that the decedent was still in the course of his employment and was looking over his work to ascertain whether he had properly greased the cups, etc., while waiting for his foreman, as he had been instructed to wait for his return from the farm.

The Court could have charged as a matter of law that decedent was engaged in interstate commerce, but instead left it to the jury.

In the case of Illanardo vs. Erie R. R., 135 Atlantic, 77, affirmed by the Court of Errors and Appeals in 137 Atlantic, 917, the Court there held:

> "Laborer at roundhouse used indiscriminately both in interstate and intrastate commerce, injured while opening door to admit an engine, held engaged in interstate commerce and entitled to benefit of federal employers' Liability Act (U. S. Comp. St., Sections 8657-8665), though the engine was not engaged in interstate commerce."

It was admitted that engine #3835, on which decedent was working, was an engine engaged in interstate commerce (R., p. 96). Having been told to finish his work on this interstate commerce engine, and his duties generally were in all kinds of commerce, and his hours of duties not having been completed, and when last seen, about some few minutes before his death, he was working on this interstate engine, at best, it was for the jury to say whether he was engaged in interstate commerce at the time of his death.

The cases cited by the petitioner in its brief are not applicable to the case sub judice. In the Harbor vs. Jenkins Rubber Co. case, 72 N. J. L., 171, the deceased met his death during the noon recess, and proceeded to another part of the employer's grounds out of mere curi-

osity, which part was not provided or customarily used by the employees.

In Harris vs. U. S. S. Co., 75 N. J. L., 861, here the plaintiff on his own volition departed from a safe place provided by the employer and took the dangerous place.

In Krysiak vs. P. R. R. Co., 270 Fed., 785, the decedent had finished his day's work and while going home, chose a dangerous way instead of the safe way provided by his employer.

In the case sub judice, the jury could have found that the decedent's hour of duty had not expired; that he had not finished his work; that some few minutes before he was injured and killed, he was working on engine #3835; that he was at the place where his foreman had placed him, doing his designated work and awaiting further instructions when he had finished this work. It was not a matter of law for the Court but under the circumstances, it was for the jury to decide.

In the case of Phoenix Mutual Ins. Co. vs. Doster, 106 U. S., 31, this Court said:

> "Where a case fairly depends upon the effect or weight of testimony, it is for the consideration and determination of the jury, and it should not be withdrawn from them unless the testimony be of such conclusive character as to compel the Court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

No one saw the deceased when he was killed, nor did anyone actually see what he was last doing. It was for the jury to say what the deceased was doing at the time he met his death.

In the case of McLaughlin vs. Joseph Horne Co., 206 Federal, Circuit Court Judge McPherson, speaking for the Third Circuit, on page 249 said:

"And a conflict may exist among the witnesses, not only where facts are directly disputed but also where it is uncertain what inferences should be drawn from the facts after these have been established. Inferences of facts are themselves facts and ordinarily the jury must draw them, and not the judge. Especially is this true when the inquiry has to do with the standard of ordinary care, care according to the circumstances, where no previously defined standard exists, and where our system of jurisprudence commits to the judgment of a jury the duty of determining the shifting rule for the particular case."

And citing cases of Grand Trunk Rwy. Co. vs. Ives, 144 U. S., 417; Texas R. R. Co. vs. Harvey, 228 U. S., 319; Slentz vs. Western Co., 180 Fed., 389.

In the case of Montecalvo vs. Wahl, 97 N. J. L., Judge Williams, speaking for the Court of Errors and Appeals, on page 559 said:

"Where fair-minded men honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue should go to the jury. It is well settled that the credibility of witnesses is in all cases a question for the jury, and a verdict will not be directed for the defendant if the evidence is conflicting and leaves the mind in a state of some doubt."

To the same effect is the case of McCarthy vs. Metropolitan Insurance Company, 75 N. J. L., 887; Bennett vs. Busch, 75 N. J. L., 240.

In the case of Westen vs. Penn. R. R., 74 N. J. L., 484 (Court of Errors and Appeals), it holds:

"If, under the evidence, reasonable minds may differ as to whether the defendant was negligent or the plaintiff guilty of contributory negligence, the Court cannot take the case from the jury and direct a verdict."

In the case of Austin vs. P. R. R. Co., 82 N. J. L., 416, the Court of Errors and Appeals, said:

"All that is required is that the circumstances be so strong that a jury may properly, on grounds of probability rather than of certainty, exclude an inference favorable to the defendant."

Where the facts are in dispute or more than one inference can be drawn from them, the question that an employee was at the time of receiving the injury sued for engaged in interstate commerce is for the jury.

See cases collected in Volume 45, page 306, section 51 of the U. S. Code Annotated.

POINT 3.

Decedent's death not due solely to his negligence and to his disobedience of orders.

What has been said under Points 1 and 2 practically applies here. It cannot be said as a matter of law that decedent's death was due solely to his negligence and to his disobedience of orders. It was a question of fact for the jury to decide.

The petitioner goes into the realm of speculation when it states in its brief that the "decedent had voluntarily left the place of safety and went to a place where his duty did not require him to go," for there is no such testimony in the record. The deceased when he was last

seen alive was working at the place and on the engine to which he had been assigned by his foreman. The jury could have found that while standing near the track on which the engine which killed him was being moved, either finishing the work he was doing or looking over the work he had completed to see if it was properly done, or if additional greasing was necessary, while awaiting his foreman who had instructed him to wait there, he was struck and killed by this engine which was moving backward out of the roundhouse without warning as it was being moved before its scheduled time.

Inasmuch as the decedent was dead, there is a presumption that he was free from negligence, which the petitioner did not rebut and which would make it a question of fact for the jury.

In the case of Erie vs. Lindquist, 27 Fed. (2nd series), 98, Circuit Court Judge Woolley, speaking for the Third Circuit, said:

> "In an action against railroad for death of fireman, the latter, being dead, is presumed free from negligence though presumption is rebuttable."

It cannot be said that the decedent attempted to commit suicide, for that is what the petitioner's argument amounts to when it states that the respondent placed himself in a position where he could be struck by the backward movement of the engine.

In the case of Manziano vs. P. S. Gas Co., 92 N. J. L., which was an appeal in a compensation case where the only proof adduced was the death of the decedent and the dangerous environment, and that gas from leaks permeated the atmosphere, the Court there said on page 326:

> "In such an environment the natural presumption is that the deceased met death while engaged in

his occupation. There was no evidence that between four and six o'clock in the morning he voluntarily entered the trench for any purpose, incompatible with his duty; nor was there any evidence that he was non compos or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane; that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption. Illustrations of the application in this jurisdiction, of deductive reasoning from circumstantial testimony, are presented in DeFazio vs. Goldschmidt Company, 87 N. J. L., 317; Bryant vs. Fissell, 84 L., 72; Muzik vs. Erie R. R., 85 L., 129. In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circumstantial testimony of the manner of death, by a logical process of rational induction, based upon human experience, from which the reasonable inference of the existence of statutory requirements was deducible, i. e., that death arose out of and in the course of the employment. The Trial Court having thus concluded upon a basis of rational inference, tantamount of legal proof of the fact, requires the affirmance of the judgment."

While it is necessary for the respondent in the case sub judice to prove that the petitioner was negligent in

the respects charged in the complaint, such proof need not be made by direct evidence, but may be made to appear circumstantially, and the question becomes one of fact for the jury.

See case of Pittsburgh C. C. & St. Louis R. R. Co. vs. Edwards, 129 N. E., 310; 20 Neg. & Comp. Cases Annotated, 342.

To the same effect is the case of State vs. Elliot, 94 N. J. L., page 76, which was a case where the deceased was struck by a fast moving, high power Packard car and the only identification of the defendant was made by witnesses who described a car similar to the defendant's which car had struck a human body and which "threw it in the air" and the left mud guard of the car was bent. The Supreme Court held that the jury might reasonably infer that it was the defendant's car which was the instrumentality which caused the homicide. The Court in this case on page 79, remarked:

> "The identification of the car and its driver, under the circumstances was almost necessarily circumstantial, but the rule is indubitable that such testimony may present a case sufficiently cogent and connected to go to the jury and afford a basis for a verdict."

The amount of the verdict in this case was very moderate, and a verdict for the respondent would have warranted a much higher amount. Perhaps this can be accounted by the fact that the jury found that the petitioner was guilty of negligence and that the respondent contributed somewhat to the accident. Whatever the negligence of the decedent may have been, it could not be said as a matter of law that it resulted solely from such negligence; that in the event it resulted in part, no matter how small a part, from the negligence of the petitioner then to that extent it was liable.

In the case of Voorhees vs. C. R. R., 14 Fed. (2nd series), 899, the Third Circuit said:

> "In an action for the death of an employee, killed on the track, where there is negligence tending to show that both decedent and defendant were negligent, the case is one for the jury, as decedent's negligence merely diminishes recovery under the Employer's Liability Act. Section 3, Com. St., 8659."

To the same effect are the cases of Illinois R. R. Co. vs. Skaggs, 240 U. S., 66; Grand Trunk Rwy. Co. vs. Lindsay, 233 U. S., 42. The determination of that liability was a matter solely within the cognizance of the jury. See Norfolk & Western Rwy. Co. vs. Earnest, 229 U. S., 114.

It is respectfully submitted that under all of the facts of the case, the questions presented were for the determination of the jury, and not for the Court, and that there was ample evidence from which the jury could have inferred negligence on the part of the petitioner.

It is respectfully submitted that the judgment below should be affirmed.

ALEXANDER SIMPSON,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 212.—October Term, 1929.

New York Central Railroad Company, Petitioner, *vs.* Donato Marcone, as Administrator of the Estate of Joseph Marcone, Deceased.	On Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey.

[April 14, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

The respondent, plaintiff below, brought suit in the Circuit Court of Hudson County, New Jersey, to recover under the Federal Employers' Liability Act, for the death of his intestate. Judgment for plaintiff was affirmed by the Court of Errors and Appeals of New Jersey. — N. J. L. —. This Court granted certiorari October 21, 1929, on a petition which asserted as grounds for allowing the writ that the court below had erroneously decided that there was evidence that at the time of the accident deceased was engaged in interstate commerce; that there was evidence of negligence on the part of petitioner; and that deceased's death was not due to his own negligence.

Decedent was employed in the roundhouse of petitioner at New Durham, New Jersey, in which there are thirty-two engine stalls, the doors to which are adjacent to and distant about 68 feet from a turntable. His duty was to fill the grease cups and pack the journal boxes of engines while in the roundhouse for inspection. On the night of the accident his hours of duty were from 7 P. M. to 3 A. M. He had worked on fourteen engines, using tools which were placed on an inspection wagon which was moved from engine to engine along a concrete runway extending in front of the engine stalls along the outer circumference of the roundhouse. He had lubricated and completed work on Engine

No. 3709 on Track 8 before eleven o'clock in the evening. The last engine he worked on was No. 3835, standing on Track 7, adjacent to Track 8 on its left when facing the roundhouse. Fellow workmen, who had finished work on the same engine before the deceased, had been sent to do work outside the roundhouse. At about 2:15 A. M. deceased was instructed by his foreman or gang leader to work on Engine 3835 and when finished to wait for the foreman at the inspection wagon which was then located on the concrete runway in front of the open space lying between Track 7 and Track 8.

There was no eye witness to the accident. At about 2:35 A. M. the decedent's body, with head and one arm severed, was discovered on the right-hand rail of Track 8, adjacent to Track 9, underneath the trucks of the tender of Engine No. 3709, which was then being backed on Track 8 from the roundhouse to the turntable. His cap was found between the rails of Track 8, about 15 feet outside of the door of the roundhouse. Blood stains were found on or near the right-hand rail of Track 8, beginning about 30 feet from the roundhouse and extending to the point where the body was found, some 60 feet or more from the door of the roundhouse.

The hostler who removed the engine from the roundhouse testified that before moving it he inspected Track 8, that he saw no one on or near the track, that he then mounted the engine, started the air pump, turned on the headlight, rear light and cab lights, started the engine bell ringing and blew three blasts of the whistle as a warning that he was about to back the engine out and as notice to the operator of the turntable. At about 2:30 A. M., some ten minutes after mounting the engine, he backed the engine toward the turntable at the rate of about four miles an hour, looking behind as he did so. The operator of the turntable not responding to the signal, he stopped the engine, blew three more blasts and when the turntable was set he again started the engine and proceeded until decedent's body was discovered.

When backing the engine the tender cut off the view of the track for a distance of about 12 feet from its rear end. The clearance between Engine No. 3709, which killed deceased, and the sides of the door to the roundhouse was about 4 inches, and between it and the engine on Track 7 was variously estimated from about 2 feet to about 3 feet 9 inches. There was much evidence

that there was constant blowing of whistles and ringing of bells in the roundhouse in connection with moving the engines and testing their whistles and bells. There was testimony by the hostler, confirmed by his foreman, that just before the movement of the engine in question the foreman cautioned him not to blow the whistle "too loud" because of complaints and warnings by the local police on account of the noise coming from the roundhouse.

Under all the circumstances disclosed by the evidence, it was a permissible inference by the jury that the sounding of whistle and bell, because of the continuous noise of whistles and bells which did not indicate movement of engines, was not sufficient warning that any particular engine was to be moved and that in fact the signal given before moving the engine in question was insufficient for that purpose. In addition, there was testimony that there was a system or custom in the roundhouse of giving warning to the men employed about the engines when they were to be removed from the roundhouse, by posting the time of removal on a blackboard located on the inside of the outer wall of the roundhouse. The time posted for the engine in question was 3 A. M., or a half hour later than the actual time of its removal. There was evidence that the foreman had warned the hostler not to take the engine out "too early". There was also evidence tending to show that the time posted on the blackboard had no reference to the time of removal of the engine from the roundhouse but merely indicated the time at which the engine must be ready for the engine crew on the appropriate siding in the yard beyond the turntable.

But the inference to be drawn from this testimony as to the existence of the custom, its purpose and the reliance which deceased under all the circumstances was entitled to place upon it, was for the jury. We think that there was sufficient evidence of petitioner's negligence to take the case to the jury. Workmen were constantly moving about the engines stalled in the roundhouse. Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine and before it was moved, sufficient time elapsed for the deceased to come into proximity with it which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the

engine without a more specific and effective warning and whether failure to give it was the cause of the death.

The jury, having found, as it might, that the negligence was the cause of the death, might also have inferred that the deceased was guilty of contributory negligence, but the trial judge correctly charged that under the Federal Employers' Liability Act contributory negligence is not a bar to recovery unless it is the sole cause of the injury or death, and may be taken into consideration by the jury in fixing the amount of damage.

The engine, No. 3835, on which deceased last worked was used in hauling interstate trains. It was not withdrawn from service. See *Walsh* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Erie Railroad* v. *Szary*, 253 U. S. 86; cf. *Industrial Commission* v. *Davis*, 259 U. S. 182. But petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it. But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act. *Erie Railroad* v. *Szary, supra; Erie Railroad Co.* v. *Winfield*, 244 U. S. 170, 173; see *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 260; *Hoyer* v. *Central Railroad Co. of New Jersey*, 255 Fed. 493, 496, 497.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.